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## Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism

Dana M. Hollywood

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# Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism

By MAJOR DANA M. HOLLYWOOD\*\*

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\* As this issue was going to the publisher, the U.S. Court of Appeals for the District of Columbia Circuit affirmed that Material Support for Terrorism is not an international-law war crime, as argued by the author in this article. *See Hamdan v. United States*, No. 11-1257, slip op. at 5-6 (D.C. Cir. Oct. 16, 2012).

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## I. Introduction

In commemoration of the tenth anniversary of 9/11, syndicated, conservative columnist George F. Will wrote a perspicacious piece entitled *Sept. 11's Self-Inflicted Wounds*. Mr. Will's editorial compares American responses to the tenth anniversary of Pearl Harbor with those of 9/11. Although Pearl Harbor heralded America's entry into an inescapable war that would ultimately cost the lives of more than 400,000 citizens,<sup>1</sup> the nation, recounted Mr. Will, met that solemn ten-year anniversary with little fanfare. As he wrote, "On Dec. 8, 1951, the day after the 10th anniversary of Pearl Harbor, the *New York Times*' front page made a one-paragraph mention of commemorations the day before, when the paper's page had not mentioned the anniversary."<sup>2</sup> Mr. Will further asserted:

The most interesting question is not how America in 2011 is unlike America in 2001 but how it is unlike what it was in 1951. The intensity of today's focus on the 10th anniversary of Sept. 11 testifies to more than the multiplication of media ravenous for content, and to more than today's unhistorical and self-dramatizing tendency to think that eruptions of evil are violations of a natural entitlement to happiness. It also represents the search for refuge from a decade defined by unsatisfactory responses to Sept. 11.<sup>3</sup>

Although not addressed by Mr. Will, the decision to try suspected terrorists associated with 9/11 by military commissions has arguably been the most unsatisfactory response to the war on terror to date. In a combative memoir published five years after 9/11, John Yoo, "the key architect for the Bush administration's legal response to the terrorist threat,"<sup>4</sup> writes that "[m]ilitary commissions have been the Bush administration's most conspicuous policy failure in the war against al Qaeda."<sup>5</sup> Indeed, the numbers

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1. See, e.g., ANNE LELAND, CONG. RESEARCH SERV., RL 32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2 (2010) (calculating that 405,399 U.S. military personnel died during service in World War II).

2. George F. Will, *Sept. 11's Self-Inflicted Wounds*, WASH. POST, Sept. 9, 2011, at A15.

3. *Id.*

4. Michiko Kakutani, *What Torture Is and Isn't: A Hard-Liner's Argument*, N.Y. TIMES, Oct. 31, 2006, at E1.

5. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 208 (2006).

alone support that supposition. Since President Bush decreed that suspected 9/11 terrorists would be tried by military commissions on November 13, 2001, until he left office on January 20, 2008, military commissions convicted three individuals – two of whom are no longer in custody.<sup>6</sup>

The Obama Administration's bifurcated approach to Article III courts and military commissions has been similarly ineffectual. Following dissemination of the Guantánamo Review Task Force report mandated by Executive Order (E.O.) 13,492 in the spring of 2010,<sup>7</sup> four detainees have pled guilty under the revised Military Commissions Act (MCA) of 2009 since commissions were restarted in the spring of 2010.<sup>8</sup>

The paucity of convictions can be attributed primarily to the lack of an existing legal precedent. Although American use of military commissions predates the founding of the United States,<sup>9</sup> the last employment of military commissions was Franklin Delano Roosevelt's (FDR) decision to try eight Nazi saboteurs in 1942.<sup>10</sup> That model – heavily relied upon by the Bush Administration – has routinely been criticized as “a precedent not worth repeating.”<sup>11</sup>

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6. See *infra* Part II.A.4.

7. Although the joint interagency task force completed its report in January 2010, the *Washington Post* reported the Administration chose not to send it to select committees on Capitol Hill until late-May 2009 due to the attempted bombing of Northwest Airlines Flight 253 on Christmas Day, 2009. See, e.g., Peter Finn, *Most Guantanamo Detainees Low-Level Fighters, Task Force Report Says*, WASH. POST, May 29, 2010, at A03 (noting that “there was little public or congressional appetite for further discussion of its plan to close the military detention center”).

8. See *infra* Part II.B.3.

9. For an historical overview of the use of military commissions in American history, see LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERROR* (2005) [hereinafter FISHER, TRIBUNALS]. See also MAJ Michael O. Lacey, *Military Commissions: A Historical Survey*, THE ARMY LAW 41 (Mar. 2002).

10. For an excellent overview of *Ex Parte Quirin*, see LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* 161 (2d ed. 2005) [hereinafter FISHER, SABOTEURS]; PIERCE O'DONNELL, *IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA* (2005); MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* (2004).

11. Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L. J. 15, 16 (2006) (“A close look at *Quirin* reveals a process and a decision with so many deficiencies that it should be remembered as a precedent not worth repeating.”). See also JAMES A. THURBER, *RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS* 331 (4th ed. 2009) (“Two years after the Court released the full opinion in *Quirin*, the Roosevelt Administration decided that the procedure it followed in 1942 was so flawed that it was not a model worth repeating.”). See

Consequently, as one practitioner explains, the lack of reliable precedent from which to draw has “resulted in a disturbing uncertainty surrounding the state of applicable law and has created extensive delays, with striking implications for individual cases.”<sup>12</sup> Congress has been forced to overhaul the system twice, from the military commissions originally conceived in President Bush’s November 13, 2001, order, to the post-*Hamdan* 2006 MCA, to the 2009 MCA. With each overhaul has come the need for new instructions and rules, often accompanied by several revisions.<sup>13</sup> Delays have been inescapable as military prosecutors have been forced to withdraw and refile charges.<sup>14</sup>

If, as suggested by the English author, Samuel Johnson, “great works are performed not by strength, but by perseverance,”<sup>15</sup> the current iteration of military commissions should serve as the Department of Defense’s (DoD’s) proverbial Battle of Gettysburg<sup>16</sup>

also *infra* note 127 and accompanying text.

12. Devon Chaffee, *Military Commissions Revived: Persisting Problems of Perception*, 9 U.N.H. L. REV. 237, 241 (2011).

13. Between March 21, 2002 and March 27, 2006 – the eve of oral arguments in *United States v. Hamdan* before the Supreme Court – the Department of Defense issued two Military Commission Orders (MCOs) (each with a single revision) and ten separate Military Commission Instructions (MCIs) (some, such as MCI4 include four separate revisions). See HUMAN RIGHTS FIRST, TRIALS UNDER MILITARY ORDER, A GUIDE TO THE RULES FOR MILITARY COMMISSIONS iv (2006). See also *Hearing to Receive Legal Issues Surrounding the Military Commissions System, Before the H. Comm. on the Judiciary*, 111th Cong. 30 (2009) (statement of Deborah N. Pearlstein, Princeton University) (“Indeed, from the time the commissions were announced in 2001 until . . . *Hamdan v. Rumsfeld*, commission rules were revised or amended no fewer than 15 times.”) [hereinafter *Legal Issues Hearing*]. The most recent revision came on December 8, 2011, with the promulgation of new rules of court. See Military Commissions Trial Judiciary R. of Court (2011), [http://www.mc.mil/LEGAL\\_RESOURCES/MilitaryCommissionsDocuments/CurrentDocuments.aspx](http://www.mc.mil/LEGAL_RESOURCES/MilitaryCommissionsDocuments/CurrentDocuments.aspx) (containing instructions for lawyers practicing before military commissions).

14. The case of Ibrahim Ahmed Mohmoud al Qosi, the first detainee to be tried under the 2009 MCA, is illustrative. The Sudanese citizen arrived at Guantánamo Bay, Cuba, in January 2002 and the Government first charged him in February 2004. His case dragged on until the parties reached a plea agreement in February 2011, meaning the Government charged al Qosi under all three variations of the military commissions system. See *United States v. Ibrahim al Qosi*, P-002, Defense Response to Government Motion for Appropriate Relief (120 Day Continuance), May 22, 2009, available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (“During this period of detention, he obviously has had no trial. Yet, he has been charged under three phases of the Guantánamo debacle, without resolution of his case.”).

15. Quotes on Perseverance, *The Samuel Johnson Sound Bite Page*, <http://www.samueljohnson.com/persever.html> (last visited Mar. 15, 2011).

16. Fought at the beginning of July 1863, the Battle of Gettysburg “has

in the war on terror. Unfortunately, this is not the case. Official encroachment by Congress into areas of critical executive branch authority<sup>17</sup> and questionable decisions<sup>18</sup> by the Court of Military Commissions Review (CMCR)<sup>19</sup> risk turning the newly constituted military commissions into a latter-day Operation Barbarossa.<sup>20</sup> This is deeply unfortunate, for patriotic Americans have worked diligently and can now claim, after two false starts, a military commissions system that is fair and transparent.

This article contends that military commissions have a legitimate role to play in bringing suspected terrorists to justice. Such a role, however, must be part of a broader strategy that includes criminal prosecution in federal courts. Moreover, Congress's recent attempts to shape American counterterrorism policy through the National Defense Authorization Act constitute a deleterious challenge to executive branch authority.<sup>21</sup>

With respect to the charge of material support for terrorism

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conventionally been regarded as the turning point of the Civil War, the victory that won the war for the Union, the great divide." JAMES A. RAWLEY, *TURNING POINTS OF THE CIVIL WAR* 147 (1989).

17. See *infra* Part II.B.1.

18. See, e.g. Kevin Jon Heller, *The CMCR Invents the "War Crime" of Material Support for Terrorism*, OPINIO JURIS (June 24, 2011, 11:36 PM), <http://opiniojuris.org/2011/06/24/the-cmcr-invents-the-war-crime-of-material-support-for-terrorism/> (criticizing the U.S. Court of Military Commission Review's decision in *United States v. Hamdan* that material support for terrorism constitutes a war crime) [hereinafter Heller, *Opinio Juris Blog*]. See also *infra* Part III.C.

19. Congress authorized the Court of Military Commission Review in the 2006 MCA. See Military Commission Act of 2006, Pub. L. No. 109-366, § 950f, 23 Stat. at 2600 (2006) (codified as amended in scattered sections of 10, 18, & 28 U.S.C.) [hereinafter 2006 MCA]. In cases in which the final decision of a military commission (as approved by the convening authority) includes a finding of guilty, appeal to the CMCR is automatic. *Id.* at § 950c(A). The 2006 MCA limited the court's jurisdiction solely "to matters of law." *Id.* at § 950f(D). The 2009 MCA significantly expanded the court's scope of review. In addition to reviewing "matters of law" the court will consider factual sufficiency and appropriateness of the sentence. See Military Commissions Act of 2009, Pub. L. No. 118-84, § 950f(D), 123 Stat. 2574-2614 (2009) (codified as amended in scattered sections of 10, 18, & 28 U.S.C.) [hereinafter 2009 MCA].

20. Proving George Santayana's famous aphorism that "those who cannot remember the past are condemned to repeat it," Hitler discarded the lessons of Napoleon's disastrous invasion of Russia in 1841 and launched his own invasion of the Soviet Union in 1941. Code-named Operation Barbarossa, Hitler's self-inflicted wound would ultimately prove Nazi Germany's demise. See PAUL JOHNSON, *MODERN TIMES THE WORLD FROM THE TWENTIES TO THE EIGHTIES* 397 (revised ed. 2001); PETER ANTILL & PETER DENNIS, *STALINGRAD 1942* 27 (2007).

21. See *infra* notes 318-26 and accompanying text.

(MST) as a crime triable by military commission, Congress has impermissibly created, rather than merely defined,<sup>22</sup> a violation of existing international law. In affirming the convictions of Salim Ahmed Hamdan<sup>23</sup> and Ali Hamza Ahmad Suliman al Bahlul,<sup>24</sup> the CMC has sanctioned Congress's overreaching in two decidedly American-centric decisions that mistakenly conflate a domestic crime with a violation of international law. In its very first two decisions, the CMC has not only threatened hard-won convictions, but has also renewed questions concerning the system's legitimacy.

Part II of this article places the charge of MST in the broader context of the theoretical underpinnings of military commissions in the war on terror. It argues that the charge of providing MST is a logically consistent consequence of the Bush Doctrine<sup>25</sup> – which was substantively enshrined in both the Authorization for Use of

22. U.S. CONST. art I, § 8, cl. 10 (“To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”) [hereinafter the Define and Punish Clause].

23. *United States v. Hamdan*, 801 F. Supp. 2d 1247 (C.M.C.R. 2011).

24. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (C.M.C.R. 2011).

25. Various commentators delineate multiple foreign policy principles articulated by the Bush Doctrine. *See, e.g.,* Charles Krauthammer, *The Bush Doctrine: In American Foreign Policy, A New Motto: Don't Ask. Tell*, CNN.COM (Feb. 26, 2001, 12:09 PM), <http://edition.cnn.com/ALLPOLITICS/time/2001/03/05/doctrine.html> (describing the *Bush Doctrine* as “a return to the unabashed unilateralism of the ‘80s”).

Nevertheless, following the attacks of September 11, 2001, it is widely accepted that the Bush Doctrine stands primarily for the proposition that the United States will make no distinction between those harboring terrorists and the terrorists themselves. *See, e.g.,* Elisabeth Bumiller, *Bush Chides Some Members of Coalition for Inaction in War Against Terrorism*, N.Y. TIMES, Nov. 10, 2001, available at <http://www.nytimes.com/2001/11/10/world/nation-challenged-president-bush-chides-some-members-coalition-for-inaction-war.html> (“A senior Administration official said Mr. Bush’s speech would be a fleshing out of what the White House calls the Bush Doctrine – the assertion that nations that harbor terrorists are as guilty as the terrorists themselves”). *See also* NATIONAL SECURITY COUNCIL: THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 12 (2006) (stating that the United States “make[s] no distinction between terrorists and those who knowingly harbor or provide aid to them.”).

For an interesting argument that the Bush Doctrine became customary international law through “instant custom” in the immediate aftermath of September 11, 2001, see Benjamin Langille, *It’s “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT’L & COMP. L. REV. 145, 156 n.3 (2003) (citing United Nations Security Council Resolution 1368, stressing that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable).



Military Force (AUMF)<sup>26</sup> and the President's November 13, 2001, military order authorizing commissions.<sup>27</sup> Indeed, both the Bush doctrine and the charge of MST seek to impose liability on a third party, provided that party possesses a "permissive"<sup>28</sup> scienter element and performs some act – no matter how innocuous – of providing assistance to a terrorist organization. Liability is imposed regardless of whether the assistance actually furthered or intended to further a terrorist act.<sup>29</sup> As Professor David Cole, counsel for the petitioners in *Holder v. HLP*, and one of the most forceful critics of the material support provision, argues, "we have made guilt by association the linchpin of the war's strategy."<sup>30</sup> That "guilt by

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26. The AUMF is the joint resolution passed by the U.S. Congress authorizing the use of armed forces against those responsible for the attacks on 9/11. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

To be sure, the AUMF and the President's military order were not the only tools aimed at substantively codifying the Bush Doctrine and providing the foundation for the charge of providing material support for terrorism. Sandwiched between the AUMF (September 14, 2001) and the military order (November 13, 2001) was Executive Order 13,224, promulgated by President Bush on September 23, 2001. The E.O. can be viewed as a precursor to the charge of providing material support for terrorism. See Exec. Order No. 13,224 § 4, 3 C.F.R. 786, (2001), *reprinted in* 50 U.S.C. § 1701 (2002) (concluding that financial donations by U.S. persons to a designated list of terrorist organizations "would seriously impair [the President's] ability to deal with the national emergency declared in this order" and prohibiting all such donations).

27. Military Order, November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

28. With respect to the material support provision, there is no need to prove an individual intended to further terrorist activity. See 18 U.S.C. § 2339B(a)(1) (2006); Robert Chesney, *The Supreme Court, Material Support, and the Lasting Impact of Holder v. Humanitarian Law Project*, 1 WAKE FOREST L. REV. 13, 14 (2011).

29. Both the 2006 MCA and the 2009 MCA define providing material support for terrorism by the following:

Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24) of this section), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

2006 MCA, *supra* note 19 § 950v(b)(25)(a); 2009 MCA, *supra* note 19, at § 950t(25).

30. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 2 (2003). See also *Aiding Terrorists: An Examination of the Material Support Statute: Hearing Before the Comm. on the Judiciary*, 108th Cong. 25

association” liability has its analytical roots in both the AUMF and the President’s military order. The charge of MST is the correspondent blossoming of those roots.

The article posits that the AUMF, President Bush’s November 13, 2001, military order authorizing commissions, and the charge of providing material support are interrelated; thus Part II begins with a detailed examination of the AUMF. It then proceeds to the military order. Whereas the former formally codified the intellectual foundation of the Bush Doctrine, the latter created a venue by which the charge of material support could then put the doctrine into practice. The article next seeks to delineate the minimal due process rights mandated at a military commission as well as the application or non-application of those rights by the Bush administration. This section concludes with a quantifiable assessment of military commissions during the Bush administration. By providing this historical context, it will be clear that the supposition that MST constitutes a war crime is not *sui generis* but represents a rational continuation of the codification of the intellectual foundations underwriting the Bush administration’s response to the war on terror.

The article next considers military commissions under the Obama administration. This discussion reveals that the paradigms of law enforcement and military commissions as counterterrorism tools have become competitive rather than complementary.<sup>31</sup> Such competitiveness is manifested most prominently in the 2011 and 2012 National Defense Authorization Acts (NDAA),<sup>32</sup> but also in

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(2004) [hereinafter *Aiding Terrorists Hearing*] (statement by Professor David Cole). *Contra* United States v. Taleb-Jedi, 566 F. Supp. 2d 157, 176 (2008) (holding that prohibitions against the conduct of providing material support or resources to a foreign terrorist organization did not unconstitutionally impose guilt by association).

31. For an interesting argument that a decade after 9/11 there is no longer any substantive difference between Article III courts and military commissions see Collin P. Wedel, Note, *War Courts: Terror’s Distorting Effects on Federal Courts*, 3 LEG. & POL’Y BRIEF 12 (2011) (“In a trend that should alarm both tribunal proponents and detractors alike, these once-antagonistic systems are becoming twins. While efforts to improve the military tribunal system to match constitutional and international legal norms have enjoyed a fair level of success, long-entrenched Article III standards are deteriorating at a pace that mirrors the pace of the tribunal’s improvements.”).

32. The Ike Skeleton National Defense Authorization Act for Fiscal Year 2011, H.R. 6523, 111th Cong. §1032, enacted as Pub. L. No. 111-383 (Jan. 7, 2011) [hereinafter 2011 NDAA]; National Defense Authorization Act for Fiscal Year 2012,

Congress's decision not to eliminate the charge of MST in the 2009 MCA.

Part III considers the military commissions' most recent self-inflicted wound – the misplaced notion that providing MST constitutes a violation of existing international law. Although both Hamdan and al Bahlul have each appealed the decisions of the CMCR to the U.S. Court of Appeals, District of Columbia Circuit, military commissions continue to level this charge. In fact, providing MST has become a standard charge on practically every charge sheet emerging from the commissions. According to the commissions' revised, public webpage, of the six pending cases, all but two defendants are charged with providing MST.<sup>33</sup> Indeed, as the sole defense counsel in *United States v. Ali Hamza al-Bahlul* testified to Congress, "if they removed this crime from the statute there would be very few detainees left to prosecute."<sup>34</sup> Time will tell whether the strategy of charging MST at military commissions proves farsighted or perhaps the final, mortal blow in a decade of self-inflicted wounds to military commissions.

## II. One Step Forward, Two Steps Back: Military Commissions in the Global War on Terror

### A. The Bush Administration: A New Paradigm

#### 1. The 2001 AUMF: A Blank Check?

The AUMF legally codified the intellectual foundations of the Bush Doctrine and continues to be "the bedrock" of the Obama Administration's legal authority to detain<sup>35</sup> and target<sup>36</sup> individuals

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Pub. L. No. 112-8, 125 Stat. 1298 (2011) [hereinafter 2012 NDAA].

33. As of this writing, the commissions currently list one case as "charges pending/active" and five cases as "charges pending/inactive." See *Military Commissions*, MILITARY COMMISSIONS CASES, <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (last visited May, 10, 2012).

34. Andy Worthington, *Lawyers Appeal Guantánamo Trial Convictions*, THE FUTURE OF FREEDOM FOUNDATION (Feb. 1, 2010), available at <http://www.fff.org/comment/com1002a.asp> (quoting Lt. Col. David J.R. Frakt).

35. See, e.g., Jeh Charles Johnson, Gen. Couns. of the Dep't of Def., Dean's Lecture at Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2011), (transcript available at <http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448> [hereinafter Johnson, Yale Speech] )("In the detention context, we in the Obama Administration have interpreted this

in the conflict against al Qaeda. It is therefore worthwhile to examine the resolution in detail. This section begins by considering the paradigmatic shift in response to acts of terrorism heralded by the AUMF. The section next considers the AUMF in detail with particular focus on the resolution's applicability, and spatial and temporal scope.

The debate that rages today – whether the 9/11 terrorist acts constitute criminal acts to be tried in Article III courts or violations of the laws of war to be tried by military commissions – was ignited shortly after United Airlines Flight 175 slammed into the south tower of the World Trade Center at 9:03:11 on September 11, 2001.<sup>37</sup> Prior to 9/11, the U.S. Government handled acts of terrorism primarily through the criminal justice system.<sup>38</sup> The attacks of 9/11,

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authority to include: those persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”).

36. With respect to targeting, the Obama Administration similarly relies upon the AUMF “as informed by the laws of war,” to include the principles of distinction and proportionality. *See, e.g.*, Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm> [hereinafter Koh, ASIL Speech] (noting that the Obama “[a]dministration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles. . .”).

While some states have objected to the use of advanced weapons systems, such as unmanned aerial vehicles, by the United States in lethal targeting operations, the Obama Administration maintains that “lethal force against known, individual members of the enemy is a long-standing and long-legal practice” and “there is no prohibition under the law of war on the use of technologically advanced weapons systems in armed conflict, so long as they are employed in conformity with the law of war.” *See* Johnson, Yale Speech, *supra* note 35; Koh, ASIL Speech. The Obama Administration further rejects the contention that targeted killings of al Qaeda members constitutes “assassination.” *See, e.g.*, Koh, ASIL Speech (“But under domestic law, the use of lawful weapons systems – consistent with applicable laws of war – for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute ‘assassination.’”).

37. The 9/11 Commission Report offers a comprehensive chronology of the events of 9/11. *See* NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 311 (2004) [hereinafter 9/11 REPORT].

38. *Id.* at 73 (“Legal processes were the primary method for responding to these early manifestations of a new type of terrorism.”). *See also* WILLIAM SHAWCROSS, JUSTICE AND THE ENEMY: NUREMBERG, 9/11, AND THE TRIAL OF KHALID SHEIKH MOHAMMED 56 (1st ed. 2010) (“Until 9/11 the United States had reacted relatively cautiously and sporadically to terrorist attacks abroad; it had taken a primarily law-enforcement approach, however shocking these assaults had been.”); John M.

however, ushered in a paradigmatic shift, enshrining the United States military as the lead response to terrorist acts.

As the journalist Bob Woodward recounts in his 2002 book, *Bush at War*, even before the grievous news that hijackers had crashed American Airlines Flight 77 into the Pentagon at 9:37:46 and civilians on a fourth jet, United Airlines Flight 93, brought down that aircraft intended for the U.S. Capitol in a field near Shanksville, Pennsylvania, at 10:02:23, the President had determined the attacks were acts of war.<sup>39</sup> Woodward vividly recounts the moment Chief of Staff Andrew Card informed the President that the second tower of the World Trade Center had been hit:

A photo of that moment is etched for history. The President's hands are folded formally in his lap, his head turned to hear Card's words. His face has a distant sober look. Almost frozen, edging on bewilderment. Bush remembers exactly what he was thinking: "They had declared war on us, and I made up my mind at that moment that we were going to war."<sup>40</sup>

That evening, in an address from the oval office, President Bush proclaimed what has since entered the lexicon as the Bush Doctrine, a sweeping proclamation that "[w]e will make no distinction between the terrorists who committed these acts and those who harbor them."<sup>41</sup> As Woodward explains, the declaration was "an incredibly broad commitment to go after terrorists and those who sponsor and protect terrorists, rather than just a proposal for a targeted retaliatory strike. The decision was made without consulting Cheney, Powell, or Rumsfeld."<sup>42</sup>

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Allen, *Expanding Law Enforcement Discretion: How the Supreme Courts Post-September 11th Decisions Reflect Necessary Prudence*, 41 SUFFOLK U. L. REV. 587, 592 (2008) ("Before the September 11th tragedies energized a national movement to protect the nation from terrorism, law enforcement dealt with acts of terrorism similarly to other crimes."); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 21 (2005) ("Prior to 9/11, the Defense Department played a limited role in U.S. counterterrorism efforts."); Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1219 (2002) ("Over the course of several years, most of the [1993 World Trade Center] bombing suspects were tried, convicted, and sentenced in the U.S. District Court for the Southern District of New York.").

39. BOB WOODWARD, *BUSH AT WAR* 15 (2002).

40. *Id.* See also GEORGE W. BUSH, *DECISION POINTS* 127 (2010).

41. See, e.g., Adam Clymer, *Before & After: Defining a Leader First by His Words*, N.Y. TIMES, Sept. 16, 2001, at A4.

42. WOODWARD, *supra* note 39, at 30. Secretary of State Colin Powell in particular had concerns with the broad scope of the declaration. ("Powell asserted

In an address to Congress and the American people nine days later, the President reiterated the assertion that the nation was at war.<sup>43</sup> The President further promised the “war on terror”<sup>44</sup> would be “unlike any other we have ever seen.”<sup>45</sup> Finally, President Bush reasserted the still undefined Bush Doctrine, warning that no distinction would be made between the actual terrorists who conducted the attacks and “any nation that continues to harbor or

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that everyone in the international coalition was ready to go after al Qaeda, but that extending the war to other terrorist groups or countries could cause some of them to drop out.”). *Id.* at 81.

43. *A NATION CHALLENGED; President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sep. 21, 2001, at A1 (“On September the 11th, enemies of freedom committed an act of war against our country.”) [hereinafter *President Bush's Address to Congress*].

44. The term “war on terror” has generated extensive criticism both within and outside the Bush Administration, and is no longer used by the Obama Administration. In a speech before the National Press Club in July 2005, the Chairman of the Joint Chiefs of Staff, General Richard B. Myers, decried the term’s limited focus on the military to the exclusion of other instruments of national power. *See, e.g.*, Eric Schmitt & Thom Shanker, *New Name for ‘War on Terror’ Reflects Wider U.S. Campaign*, N.Y. TIMES, July 26, 2005, at A7 (“[i]f you call it a war, then you think of people in uniform as being the solution.”). President Bush’s National Security Advisor, Stephen Hadley echoed this view in an interview with the *New York Times* in 2005, claiming that the conflict “was more than just a military war on terror.” Richard W. Stevenson, *President Makes It Clear: Phrase Is ‘War on Terror’*, N.Y. TIMES, Aug. 4, 2005 at A12. Secretary of Defense Donald Rumsfeld attempted to replace the phrase in 2005 with the ambitious “Global Struggle Against Violent Extremism” or GSAVE but was quickly overruled by the President. *Id.* (“In a speech here, Mr. Bush used the phrase “war on terror” no less than five times. Not once did he refer to the “global struggle against violent extremism,” the wording consciously adopted by Defense Secretary Donald H. Rumsfeld and other officials . . .”).

Outside the Bush Administration, criticism has focused primarily on the mischaracterization of the nature of the enemy. Terrorism expert and Yale Law School Professor Bruce Ackerman, for example, claims that the slogan “[w]ar on terror” is, on its face, a preposterous expression, “as terrorism is not the enemy but merely a technique.” BRUCE ACKERMAN, *BEFORE THE NEXT ATTACKS: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 13 (2006). Retired Lieutenant Colonel John A. Nagl, a coauthor of the U.S. Army’s counterinsurgency field manual (FM 3-24) has said the phrase “was enormously unfortunate because . . . it pulled together disparate organizations and insurgencies.” *See* Scott Wilkinson & AL Kamen, *‘Global War on Terror’ Is Given New Name*, WASH. POST, Mar. 25, 2009, at A04. The Obama Administration no longer uses the phrase “Global War on Terror” but uses the more sterile “Overseas Contingency Operation.” *Id.*

45. *President Bush's Address to Congress*, *supra* note 43, at A1 (“Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen. It may include dramatic strikes visible on TV and covert operations, secret even in success.”).

support terrorism.”<sup>46</sup>

With little debate and only token resistance, Congress passed S.J. Res. 23 (Authorization for Use of Military Force) on September 14, 2001, and the President signed the legislation on September 18, 2001.<sup>47</sup> Quite astonishingly, the authorization the President initially sought from Congress was even more expansive than the exceedingly broad authorization he signed into law. The original draft joint resolution would have additionally granted the President the authority “to deter and pre-empt future acts of terrorism or aggression against the United States.”<sup>48</sup> As a Congressional Research Services report explains:

This language would have seemingly authorized the President, without durational limitation, and at his sole discretion, to take military action against any nation, terrorist group or individuals in the world without having to seek further authority from the Congress. It would have granted the President open-ended authority to act against all terrorism and terrorist or potential aggressors against the United States anywhere, not just the authority to act against the terrorist involved in the September 11, 2001 attacks, and those nations, organizations and persons who had aided or harbored the terrorists.<sup>49</sup>

The version of the AUMF signed into law is a short document

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46. *Id.*

47. The Authorization for Military Use of Force (AUMF) passed the Senate on September 14, 2001 with 98 ayes, 0 nays, and 2 present/not voting. The AUMF passed the House of Representatives the same day by a vote of 420 ayes, 1 nay, and 10 not voting. See Peter Carlson, *The Solitary Vote of Barbara Lee: Congresswoman Against the Use of Force*, WASH. POST, Sept. 19, 2001, at C1.

Like Jeannette Rankin before her, Congresswoman Barbara Lee (D-Calif.) cast the lone vote against the AUMF. In explaining her vote on the floor of the House, Congresswoman Lee said, “However difficult this vote may be, some of us must urge the use of restraint. There must be some of us who say, let’s step back for a moment and think through the implications of our actions today – let us more fully understand its consequences.” 147 Cong. Rec. H5672 (daily ed. Sept. 14, 2001) (statement of Rep. Lee). See also Rep. Barbara Lee, *Why I Opposed the Resolution to Authorize Force*, S.F. CHRON., (Sept. 23, 2001), <http://www.commondreams.org/views01/0923-04.htm> (“It was a blank check to the president to attack anyone involved in the Sept. 11 events – anywhere, in any country, without regard to out nations’ long-term foreign policy, economic and national security interests, and without time limit.”).

48. 147 Cong. Rec. S9949-S9951 (daily ed. Oct. 1, 2001).

49. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-140): LEGISLATIVE HISTORY 2 (2001).

consisting of five “whereas” clauses delineating the purposes for the resolution and the authorization contained in section 2. Section 2(a) authorizes the President

to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organization or persons.<sup>50</sup>

While congressional authorizations to use military force have often been granted to Presidents in place of a more expansive declaration of war, the 2001 AUMF was *sui generis* in three important aspects. First, the 2001 AUMF authorized military force against “organizations and persons” connected – however remotely – to the attacks.<sup>51</sup> While the AUMF never implicitly states which organizations are covered, Congress is clearly referring to al Qaeda, the global militant Islamic organization that ordered and executed the 9/11 attacks. Consequently, inclusion of the term “organizations” would sweep up any person who is a member of al Qaeda (even if that individual had no link to the 9/11 attacks). While that same person would not be covered by the AUMF in his *individual* capacity, as the language only applies to those individuals who “planned, authorized, committed or aided the terrorist attacks,” he would be covered in his *organizational* capacity.<sup>52</sup>

Second, the spatial scope of the AUMF is similarly far-reaching. The text assumes that the President can act anywhere he determines the enemy to be – to include the continental United States – thereby imposing no geographic limitations on the use of force.<sup>53</sup> Like the Bush Administration, President Obama’s Administration wholly endorses this view. Indeed, in recent remarks, the President’s

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50. S.J. Res. 23, 107th Cong. § 2(a) (2001).

51. GRIMMETT, *supra* note 49, at 4 (“In its past authorizations for use of U.S. military force, Congress has permitted action against unnamed nations in specific regions of the world, or against named individual nations but never against ‘organizations or persons.’”).

52. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2109 (2005).

53. See, e.g., Joshua Alexander Geltzer, *Decisions Detained: The Courts’ Embrace of Complexity in Guantánamo-Related Litigation*, 29 BERKELEY J. INT’L L. 94, 98 (2011) (“Geographic limits and boundaries simply fail to contain the war against terrorism within the type of geographic space that delineated the scope of traditional wars.”).



Assistant for Homeland Security and Counterterrorism, the Defense Department's General Counsel, and the State Department's Legal Advisor, have all asserted that the authority of the United States to use, detain, and target al Qaeda members should not be confined to "hot" battlefields of Afghanistan as we continue to be engaged in an armed conflict against al Qaeda.<sup>54</sup> While many of our closest allies do not share this view,<sup>55</sup> the Obama Administration argues that confining force to Afghanistan fails to consider the decentralized nature of al Qaeda over the past decade,<sup>56</sup> and relies upon an inflexible notion of what constitutes an "imminent" attack.<sup>57</sup>

Finally, the temporal scope distinguishes the AUMF from previous authorizations of military force.<sup>58</sup> Due to the enigmatic nature of the war on terror, Congress chose not to limit the President in terms of when he could act. This contrasts with other terrorism legislation, notably the USA PATRIOT Act, which included a sunset clause.<sup>59</sup> In light of the Supreme Court's holding

54. See Johnson, Yale Speech, *supra* note 35; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Harvard Law School (Sept. 16, 2011), available at <http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices/> [hereinafter Brennan, Harvard Speech]. See also Koh, ASIL Speech, *supra* note 36.

55. See, e.g., Brennan, Harvard Speech, *supra* note 54 ("Others in the international community take a different view of the geographic scope of the conflict, limiting it only to the 'hot' battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against al-Qa'ida . . . if it amounts to an 'imminent' attack.").

56. *Id.* ("[O]ver the last 10 years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.").

57. Dating back to the 1837 *Caroline* case, the United States has held that consistent with customary international law (and after 1945, Article 51 of the U.N. Charter), a state may employ force in self-defense if in addition to being attacked, an armed attack is determined to be imminent. Under this construction, "a state is not required to absorb the 'first hit' before it can resort to the use of force in self-defense to repel an imminent attack." JEFF A. BOVARNICK ET AL., U.S. ARMY, JUDGE ADVOCATE GEN.'S LEGAL CTR. AND SCH., LAW OF WAR DESKBOOK 40 (GREGORY S. MUSSELMAN ED., 2011). See also Brennan, Harvard Speech, *supra* note 54 ("We are finding increasing recognition in the international community that a more flexible understanding of 'imminence' may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the way that evidence imminence in more traditional conflicts.").

58. See, e.g., Bradley & Goldsmith, *supra* note 52, at 22123, n.332 (noting that previous authorizations, to include Lebanon, Somalia, and Taiwan, all required temporal limitations).

59. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No.

in *Hamdi v. Rumsfeld*, inherent within the AUMF is the power to detain any individual who falls within the scope of the statute for the duration of the relevant conflict.<sup>60</sup>

The absence of such limitations raises troubling questions as to the length of time an individual may be detained in the war on terror.<sup>61</sup> The traditional law of war rule is detention may last no longer than active hostilities.<sup>62</sup> The purpose of this rule is preventive in nature – to ensure enemy combatants do not return to the battlefield while hostilities are ongoing.<sup>63</sup> Consequently, once fighting terminates, the rationale for detention dissolves.<sup>64</sup>

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107-56 § 224(a), 115 Stat. 272, 295 (2001) (“[T]his title and the amendments made by this title . . . shall cease to have effect on December 31, 2005.”) [hereinafter PATRIOT Act].

60. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (“[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention . . .”).

61. Subsequent to the Court’s holding in *Hamdi*, the legal debate has generally shifted to the question of the nexus an individual must have to al Qaeda to be covered by the AUMF. In particular, courts have just begun to grapple with the quandary presented by the charge of providing material support for terrorism.

62. See Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW] (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 2(2), June 8, 1977, 1125 U.N.T.S. 609:

At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protections of Article 5 and 6 until the end of such deprivation or restriction of liberty.

63. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art.19-art.20, Aug. 12, 1949, Int’l Comm. of the Red Cross Commentary (1960) [hereinafter GPW Commentary].

While NGOs voice skepticism, the Pentagon claims the threat of released detainees returning to active hostilities has been substantiated. A 2010 Department of Defense report concluded that one of out five detainees transferred abroad from Guantánamo Bay has engaged in subsequent acts of terrorism. See Elisabeth Bumiller, *Many Ex-Detainees Said to Be Engaged in Terror*, N.Y. TIMES, Jan. 7, 2010, at A16.

64. See, e.g., WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1288 (2d ed. 1920) (“It is now recognized that – ‘Captivity is neither a punishment nor an act of vengeance’ but ‘merely a temporary detention which is devoid of all penal character.’”).

The official commentary to Additional Protocol II maintains, however, that security

Application of this norm to a conflict in which “there is no obvious point at which the U.S. will be able to declare victory”<sup>65</sup> potentially subjects detainees – some for merely being a member of a designated enemy terrorist organization – to lifetime detention.<sup>66</sup>

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requirements may necessitate detention in common article 3 conflicts, as opposed to common article 2 conflicts, in limited circumstances. See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1360 (Yves Sandoz et al., eds., 1987). Paragraph 4493 states in full:

In principle, measures restricting people’s liberty, taken for reasons related to the conflict, should cease at the end of active hostilities, i.e., when military operations have ceased, except in cases of penal convictions. Nevertheless, if such measures were maintained with regard to some persons for security reasons, or if the victorious party were making arrests in order to restore public order and secure its authority, legal protection would continue to be necessary for those against whom such actions were taken.

See also John B. Bellinger & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 229 (2011).

65. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 726 (2004) (“For that matter, since al Qaeda is not a state, it is not obvious that al Qaeda can formally surrender. . . . And since we apparently lack any means of formal communication with al Qaeda’s leadership . . . there is no clear way to negotiate.”). See also *Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing before the S. Comm. on Armed Services*, 111th Cong. 40 (2009) (statement of Major General (Ret.) John D. Altenburg, Jr., former Deputy Judge Advocate General of the Army) (“[w]hat does this 21st century non-state actor paradigm mean for the right under the Geneva Convention to detain people you’ve captured until the war is over if you can’t really define when the war is over”) [hereinafter *2009 Military Commissions Hearing before Armed Services*].

But cf. ROBIN WRIGHT, *ROCK THE CASBAH: RAGE AND REBELLION ACROSS THE ISLAMIC WORLD* 5 (2011) (for an alternative view that the end of the war on terror may be forthcoming). In a recent book chronicling the Arab spring, Ms. Wright, an intrepid foreign correspondent and a Middle East watcher of the first rank, argues that in a “post-jihadist era” al Qaeda has failed to achieve any of its goals and is increasingly irrelevant. (“A decade later, al Qaeda’s goals seemed further away than ever. Compared with the vast number of democracy activities, cultural innovators, and new voices in the Islamic world, al Qaeda’s extremists looked like pathetic thugs and losers.”).

66. Justice O’Connor acknowledged as much in the Court’s plurality opinion in *Hamdi v. Rumsfeld*:

If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi’s detention could last for the rest of his life.

542 U.S. 507, 520 (2004).

Dissatisfaction with this traditional norm has led to calls for alternatives.<sup>67</sup> Perhaps the most auspicious is that expressed by Professors Curtis Bradley and Jack Goldsmith, who advocate an individualized assessment whereby detention authority would terminate over a detained individual once a determination has been made that the individual no longer poses a threat. As they explain:

Under this approach, the question is not whether hostilities have ceased with al Qaeda and related terrorist organizations, but rather whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining the hostilities. A determination of the existence of such a danger could be based on, among other things, the detainee's past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile.<sup>68</sup>

One advantage to this approach is its consistency with traditional law of war rules. As Bradley and Goldsmith explain, "many of the traditional rules contemplate release of an enemy combatant based on an individualized determination that the combatant does not present a serious threat."<sup>69</sup>

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67. See, e.g., Bellinger & Padmanabhan, *supra* note 64, at 240 (considering three alternatives to the 'cessation of active hostilities' norm). *Contra* Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 HARV. INT'L L. J. 301, 301 (2009) (arguing that the Third Geneva Conventions is "sufficiently flexible to accommodate tactics in the War on Terror.").

68. Bradley & Goldsmith, *supra* note 52, at 2125.

69. *Id.* For example, Article 132 of the Fourth Geneva Convention reads: "Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), art. 132, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilian Convention].

Article 109 of the Third Geneva Convention provides that parties to the conflict are obligated to send back the seriously sick or injured prisoners of wars to their own country. Additionally, the second paragraph of Article 109 permits agreements "with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity."

GPW, *supra* note 62, art. 109.

Article 110 of the Third Geneva Convention requires repatriation of different categories of prisoners of war, to include "[p]risoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat."

The Obama Administration appears to be moving toward a model of repatriation based upon individualized assessments. Upon taking office, President Obama issued Executive Order 13,492, calling for the closure of Guantánamo Bay within one year.<sup>70</sup> In support of that goal, the President ordered a comprehensive interagency review<sup>71</sup> of the legal bases for detention of the 242 individuals detained at Guantánamo.<sup>72</sup> One year after the issuance of the Executive Order, the Guantánamo Task Force released its findings.<sup>73</sup> Additionally, on March 7, 2011, the President issued Executive Order 13,567, resurrecting the process of conducting periodic reviews of detention decisions.<sup>74</sup> The standard for continued detention under the periodic review board process is based upon a finding that "it is necessary to protect against a significant threat to the security of the United States."<sup>75</sup>

In addition to Bradley and Goldsmith's innovative alternative, a second option to the cessation of active hostilities norm would be linking a conflict with non-state actors to a traditional international armed conflict. As the former legal advisor for the U.S. Department of State, John Bellinger III, explains, under such an approach, the end of the common article 2 conflict between the United States and Afghanistan<sup>76</sup> would herald the end of the conflict with al Qaeda for

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*Id.* art. 110.

70. Exec. Order No. 13,492, 3 C.F.R. 4897 (2009).

71. The President's E.O. tasked the following six entities with conducting the first of a series of periodic reviews on all prolonged detentions: the Departments of Justice, State, Defense, Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff. See Koh, ASIL speech, *supra* note 36.

72. DEP'T OF JUSTICE ET AL., FINAL REPORT: GUANTÁNAMO REVIEW TASK FORCE 9 (2010).

73. *Id.* at 9-10 (concluding that of the 240 detainees subject to the Executive Order, "126 were approved for transfer, 36 were referred for prosecution, 48 were approved for continued detention under the AUMF, and 30 detainees from Yemen were approved for 'conditional' detention based on present security conditions in Yemen.").

74. Exec. Order No. 13, 567 3. C.F.R. 13277 (2011).

75. *Id.* § 2.

76. Arguably, the international armed conflict between the United States and Afghanistan terminated in June 2002. The loyal jirga, appointed Hamid Karzai as Interim President of the Afghan Transitional Administration on June 13, 2002. See Carlotta Gall & James Dao, *A Buoyant Karzai is Sworn in as Afghanistan's Leader*, N.Y. TIMES, June 20, 2002, at A12. For the view that the international armed conflict concluded in December 2002, see U.S. v. Prospero, 573 F. Supp. 2d 436, 455 (D. Mass. 2008) ("On December 22, 2001, the United States formally recognized and extended full diplomatic relations to the new government of Hamid Karzai. That recognition

detention purposes.<sup>77</sup> Consequently, this approach takes a narrow view toward the term “active hostilities” in Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), and fails to consider the authority of the United States to detain individuals in the current common article 3 conflict in Afghanistan.<sup>78</sup>

The Supreme Court has provided little guidance to the critical debate of the temporal limits to detain individuals in the war on terror. Despite the Government’s position in *Hamdi v. Rumsfeld* that temporal parameters do not apply to a war against terrorists, the Court steadfastly refused to establish any such limitations, defining the issue as not ripe.<sup>79</sup> In her plurality opinion, Justice O’Connor did, however suggest that the traditional law of war paradigm may, at some point, prove inapplicable to the unconventional war on terror:

[W]e understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.<sup>80</sup>

Just two years after the *Hamdi* decision, holding that the AUMF implicitly authorized the detention of individuals in the war on terror, the Supreme Court would hold in *Hamdan* that the AUMF, broad though it was, could not be read to provide specific authorization for military commissions.<sup>81</sup> It is to the subject of the President’s military order establishing commissions and

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signaled the cessation of a state of war with Afghanistan.”).

77. Bellinger & Padmanabhan, *supra* note 64, at 230.

78. See, e.g., YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 23 (2009) (citing the ICRC’s November 19, 2002, Aide-Mémoire to the United States setting forth the view that the common article 2 conflict transformed into a common article 3 conflict in June 2002. Per the ICRC, on that date, the Geneva Conventions ceased to furnish a legal basis for detention without criminal charges).

79. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (“Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.”).

80. *Id.* at 521.

81. *Hamdan v. Rumsfeld*, 548 U.S. 557, 561 (2006).

implementing the theoretical foundations of the AUMF that this article now turns.

## 2. *A Precedent Worth Repeating? Quirin and President Bush's Military Order*

On November 13, 2001, a little more than two months after the AUMF became law, President Bush signed a military order authorizing detention of noncitizen terrorists and, if necessary, trial by military tribunals for violations of the laws of war.<sup>82</sup> While the individuals carrying out the September 11 attacks violated numerous domestic criminal laws,<sup>83</sup> President Bush's military order clearly established an intent to treat the attacks as acts of war rather than mere criminal acts.<sup>84</sup>

To properly understand President Bush's Order, one must first consider the history of military commissions. In a celebrated passage beginning *The Common Law*, Justice Holmes explained, "[i]n order to know what it is, we must know what it has been."<sup>85</sup> The section begins with a review of the historical authority for military commissions. The section next analyzes President Bush's Order with parallels to Proclamation No. 2561 – the military commission established by FDR to try eight Nazi agents who had covertly entered the United States to commit acts of terrorism in 1942.

### *a. Historical Precedents*

According to Colonel William Winthrop, "the Blackstone of Military Law,"<sup>86</sup> military commissions, a military tribunal neither mentioned in the Constitution nor created by statute, were born of military necessity.<sup>87</sup> The first recorded use of military commissions occurred in 1847 during the Mexican-American War.<sup>88</sup> Serving as

82. Military Order, *supra* note 27.

83. See generally CHARLES DOYLE, CONG. RESEARCH SERV., 95-1050, TERRORISM AT HOME AND ABROAD: APPLICABLE FEDERAL AND STATE CRIMINAL LAWS (2001) (examining "the constitutional power of Congress and of state legislatures to enact anti-terrorist legislation and the extent to which they have done so").

84. Military Order, *supra* note 27, §1(a) ("International terrorists, including members of al Qaeda, have carried out attacks . . . on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.").

85. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1948).

86. Reid v. Covert, 354 U.S. 1, 19 n.18 (1957) (plurality opinion).

87. WINTHROP, *supra* note 64, at 831.

88. Hamdan v. Rumsfeld, 548 U.S. 557, 590 (2006) (explaining that although

Commander of occupied Mexico, General Winfield Scott was greatly concerned with acts of lawlessness committed by the indigenous population. As Mexicans could not be tried under the Articles of War, and having no other tribunal available, General Scott established a military commission to try offenses against the law of war.<sup>89</sup> Although the Supreme Court later denounced General Scott's use of military commissions in occupied Mexico,<sup>90</sup> military commissions were nonetheless used extensively during the Civil War.<sup>91</sup>

Having surveyed "what sparse legal precedent exists,"<sup>92</sup> to include Colonel Winthrop's seminal treatise, *Military Law and Precedents*, the *Hamdan* Court identified three situations in which military tribunals have been used: first, to replace civilian courts when the state had declared martial law; second, to try civilians in territory occupied by the United States (as in the 1847 precedent); and finally, as "an incident to the conduct of war" when an enemy has violated the law of war.<sup>93</sup> One writer has referred to the first two uses as "territory-based commissions."<sup>94</sup> The *Hamdan* Court referred to the third use as a "law of war" commission. President Bush's Order falls within this third use.

As the history of the commissions convened in Mexico reveal, the use of military commissions has traditionally been at the discretion of the President or his military commanders in the field.<sup>95</sup>

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precursors to military commissions were employed during the Revolutionary War, the "commission 'as such' was inaugurated in 1847"). See also WINTHROP, *supra* note 64, at 832 ("It was not until 1847, upon the occupation by our forces of the territory of Mexico . . . that the military commission was, as such, initiated.").

89. WINTHROP, *supra* note 64, at 832. See also FISHER, TRIBUNALS, *supra* note 9, at 32-33; H. Wayne Elliot, *Military Commissions: An Overview*, in ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW 124 (David K. Linnan, ed., 2008).

90. *Jecker v. Montgomery*, 54 U.S. 498, 515 (1851) ("And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.").

91. See, e.g., *Ex Parte Milligan*, 71 U.S. 2, 124 (1866) (holding that use of military tribunals for American citizens when civilian courts are operational is unconstitutional).

92. *Hamdan*, 548 U.S. at 595.

93. *Id.*

94. Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin*, 42 AKRON L. REV. 13, 46 (2009).

95. WINTHROP, *supra* note 64, at 831 ("In general, however, it has left it to the President, and the military commanders representing him, to employ the



Consequently, military commissions raise separation-of-powers issues "of the highest order."<sup>96</sup> As one writer has explained, "the power to create [military commissions] lies at a constitutional crossroads."<sup>97</sup>

Congress would clearly have the authority to establish a military commission pursuant to its enumerated powers to "declare war" and "make rules concerning capture on land and water;"<sup>98</sup> to "define and punish offenses against the Law of Nations,"<sup>99</sup> and to make regulations to regulate the armed forces.<sup>100</sup> The power of the President to convene military commissions flows from his authority as Commander in Chief of the Armed Forces.<sup>101</sup> Under Article 21, Uniform Code of Military Justice, as well as its precursor, Article 15, the Articles of War, the President "has at least implicit authority to convene military commissions to try offenses against the law of war."<sup>102</sup>

After Congress enacted the Articles of War in 1806, it did not undertake a revision for more than a century, prompting Secretary of War Henry L. Stimson to pronounce the Articles "notoriously unsystematic and unscientific."<sup>103</sup> In 1912, during hearings before the House Committee on Military Affairs, the Judge Advocate General of the Army, Brigadier General (BG) E.H. Crowder,

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commission, as occasion may require, for the investigation and punishment of violations of the laws of war . . .").

96. *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring) ("Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review.").

97. Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 27-50-350 ARMY LAW. 19, 20 (2002).

98. U.S. CONST. art. I, § 8, cl. 11. *See also* Winthrop, *supra* note 64, at 831 ("But, in general, it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies' from which this tribunal derives its original sanction.").

99. U.S. CONST. art. I, § 8, cl. 10.

100. *Id.* art. I, § 8, cl. 14.

101. *Id.* art. II, § 2, cl. 1.

102. JENNIFER ELSEA, CONG. RESEARCH. SERV., RL 31191, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 17 (2001). *See also* 10 U.S.C. § 821 (2011).

103. *Revision of the Articles of War: Hearing on H.R. 23682 Before the H. Comm. on Military Affairs*, 62d Cong. 3 (1916) (statement of Henry L. Stimson, Secretary of War) (Secretary Stimson's full quote reads, "[t]he existing articles are notoriously unsystematic and unscientific. Inevitably this condition hampers their easy and effective enforcement.").

unveiled an “entirely new” article concerning military commissions. Although such commissions had “not been formally authorized by statute,” they were, he argued, “an institution of the greatest importance in a period of war.”<sup>104</sup> BG Crowder testified that the new article was critical to ensure that expansion of court-martial jurisdiction over U.S. military members (to include offenses against the laws of war) did not preempt military commissions.<sup>105</sup> Enacted in 1916, BG Crowder’s Article 15 would undergo a slight modification in the 1920 revision to the Articles of War to read:

Art. 15. Jurisdiction Not Exclusive. – The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offense that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.<sup>106</sup>

While ensuring courts-martial would not deprive commissions of concurrent jurisdiction, Congress contemporaneously sought to limit the procedures by which the President could implement military commissions in Article 38 of the 1920 Articles of War.<sup>107</sup>

FDR relied in part on Articles 15 and 38 in appointing a commission to try eight Nazi saboteurs bent on sabotage.<sup>108</sup> During

104. *Id.* at 29 (statement of Brigadier General E. H. Crowder, Judge Advocate General of the Army) (citing approvingly of the use of military commissions during the Mexican-American War and the Civil War).

105. Brigadier General Crowder explained:

There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap [with] that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war-jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.

*Id.* See also FISHER, *SABOTEURS*, *supra* note 10, at 32.

106. National Defense Act Amendments of 1920, Pub. L. No. 66-242, 41 Stat. 759, 790. See also *infra* note 115.

107. U.S. WAR OFFICE, *THE ARTICLES OF WAR* 11-12 (1920). See also *infra* note 116.

108. See, e.g., H.L. POHLMAN, *TERRORISM AND THE CONSTITUTION* 254 (2007). FDR appointed Major General Frank R. McCoy as president of the commission as well as three major generals and three brigadier generals to serve on the seven-man commission. Colonel Cassius M. Dowell and Colonel Kenneth Royall served as defense counsel. Attorney General Francis Biddle and Major General Myron C. Cramer, the Judge Advocate of the Army, served as the prosecutors. FISHER, *TRIBUNALS*, *supra* note 9, at 91.

the military commission, the saboteurs' defense counsel petitioned the Supreme Court for a writ of habeas corpus to challenge the constitutionality of the commission.<sup>109</sup> Following the Court's decision that the commission possessed jurisdiction to try the saboteurs, the commission convicted all eight men and sentenced six to death.<sup>110</sup> The Court did not issue an opinion in *Ex Parte Quirin* until October 29, 1942 – almost three months after six of the saboteurs had been executed.<sup>111</sup> The Court's opinion focused on the jurisdiction of the military commission, holding that Article 15 in and of itself provided congressional authorization to the President to convene military commissions.<sup>112</sup> This expansive interpretation received skepticism from the *Hamdan* Court sixty-four years later. Justice Stevens wrote in the plurality opinion, "We have no occasion to revisit *Quirin's* controversial characterization of Article of War 15 as a congressional authorization for military commissions."<sup>113</sup>

In 1950 Congress enacted the Uniform Code of Military Justice (UCMJ), consolidating and revising the Articles of War, the Articles for the Navy, and the Disciplinary Laws of the Coast Guard.<sup>114</sup> The UCMJ reenacted Article 15 as Article 21 (UCMJ). As of today, the language of Article 21 of the UCMJ remains substantially identical to Article 15, Articles of War.<sup>115</sup> The UCMJ reenacted Article 38 as Article 36 (UCMJ).<sup>116</sup> Article 36 slightly revises Article 38 and

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109. *Id.* at 56.

110. *Id.* at 63, 71.

111. *Id.* at 71.

112. *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.").

113. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006).

114. See Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

115. Compare *supra* note 106 with 10 U.S.C. § 821 (2011) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals. This section does not apply to a military commission established under chapter 47A of this title.").

116. Article 36, Uniform Code of Military Justice, states in full:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the

obligates the president to utilize the rules of evidence as applied in criminal cases so far as he considered it “practicable” to do so.<sup>117</sup> Article 36, UCMJ, would prove highly consequential to the Bush Administration’s design of trying terrorists by military commissions. In 2006, the Supreme Court invalidated the commissions based in part on the President’s failure to comply with Article 36(b), UCMJ, holding, “[b]ecause UCMJ Article 36 has not been complied with here, the rules specified for Hamdan’s commission trial are illegal.”<sup>118</sup>

*b. The Past is Present: Analysis of the President’s Military Order*

In contradistinction to the AUMF, President Bush’s military order was promulgated without congressional consultation.<sup>119</sup> This is particularly curious given the wholesale support Congress provided the President with respect to both the AUMF and the USA PATRIOT Act, as well as the expediency with which the legislative branch passed both bills.<sup>120</sup> The President, moreover, chose to

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principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable, except insofar as applicable to military commissions established under chapter 47A of this title.

10 U.S.C. § 836 (2006).

117. 10 U.S.C. § 836(b) (2006).

118. *Hamdan*, 548 U.S. at 561 (holding that although the President had concluded that it was impracticable to apply rules governing criminal cases to military commissions, he failed to make a similar determination that it was impracticable to apply the rules for courts-martial and nothing in the record demonstrated it would be impracticable to do so).

119. See, e.g., *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 2 (2001) [hereinafter *Preserving Our Freedoms*] (statement of Sen. Patrick Leahy (D-VT), Chairman, S. Comm. on Judiciary) (“Rather than respect the checks and balances that make up our constitutional framework, the executive branch has chosen to . . . cut out Congress in determining the appropriate tribunal and procedures to try terrorists.”). *Id.* at 21 (quoting Sen. Ted Kennedy (D-MA) as stating he had received “absolutely no indication” of tribunals being authorized.). See also Robin Toner & Neil A. Lewis, *A Nation Challenged: Civil Liberties; White House Push on Security Steps Bypasses Congress*, N.Y. TIMES, Nov. 15, 2001, at A1 (quoting Representative Bob Barr (R-GA), a member of the House Judiciary Committee as stating, “I’m not aware that they’re consulting at all.”).

120. During his opening statement at hearings conducted in December 2011 by the Senate Committee on the Judiciary, Chairman Leahy noted:

We passed the [AUMF] in record time and with an extraordinary level of

bypass advice of military Judge Advocates<sup>121</sup> as well as an interagency team. The President had assembled the team from the Departments of Defense, State, and Justice to consider options for prosecuting the perpetrators of the 9/11 attacks. When it failed to act with the requisite alacrity the Administration sought, the President chose to ignore the team.<sup>122</sup> Instead, drafting the military order fell largely to White House Counsel Alberto R. Gonzales, a Bush confidante and former attorney from Texas.<sup>123</sup>

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cooperation between Democrats and Republicans, the House and the Senate, and the White House and Congress. The separate but complementary roles of these branches of Government, working together and sharing a unity of purpose, made that bill a better law than either could have made through a unilateral initiative.

*Preserving Our Freedoms*, *supra* note 119, at 2 (statement of Sen. Patrick Leahy (D-VT), Chairman, S. Comm. on Judiciary).

121. *See, e.g.*, Adam Liptak, *U.S. Barred Legal Review of Detention, Lawyer Says*, N.Y. TIMES, May 19, 2004, at A14 (quoting Miles P. Fischer, the chairman of the bar association's Committee on Military Affairs and Justice as saying, "JAG officers were given very little opportunity to participate in the order establishing military commissions."). *See also* Jeanne Cummings, *Gonzales Rewrites Laws of War - White House Counsel's Methods Outrage Military Legal Experts*, WALL ST. J., Nov. 26, 2002, at A4 ("Career Pentagon lawyers in the Judge Advocate General's Office were furious that they read first in news reports that Mr. Gonzales had devised the legal framework for military commissions.")

122. *See, e.g.*, Michael A. Newton, *Some Observations on the Future of U.S. Military Commissions*, 42 CASE W. RES. J. INT'L L. 151, 152-53 (2009).

In his book *War by Other Means*, John Yoo attributes President Bush's circumvention of the interagency team to departmental infighting. He writes:

Defense wanted to decide, but Ashcroft, ever a defender of his bureaucratic turf, wanted a veto. After a contentious White House meeting, President Bush broke the deadlock by deciding that only he would decide when an al Qaeda detainee would be sent before a military court - which was the right outcome, placing the responsibility where it ought to rest.

YOO, *supra* note 5, at 206.

Additionally, Yoo puts much of the blame to come to an expedient recommendation at the feet of the military, whom he describes as naïve and unwilling to accept the challenges of the twenty-first century. He writes:

The Defense Department wanted a showcase of military justice at its finest, with rules of substance and procedures that would withstand any scrutiny, both at home and abroad. It was a laudable goal, but it inevitably led to long bureaucratic delays among all the involved agencies. Some military lawyers also resisted creating the commissions . . . . Military commissions, they argued, would 'taint' the court-martial process. Military commissions became another flash point in the struggle pitting the military establishment against Rumsfeld and his civilian advisers in his effort to transform the military in order to address twenty-first-century challenges.

*Id.* at 206.

123. *See, e.g.*, Cummings, *supra* note 121.

Without the benefit of his interagency experts, Congress, or the advice of a recent precedent<sup>124</sup> the President looked back to FDR's July 2, 1942 military order<sup>125</sup> establishing a military commission.<sup>126</sup> Given the disapprobation *Ex Parte Quirin* has garnered, it was a questionable model on which to rely.<sup>127</sup>

President Bush cited four sources of authority in his November 13, 2001, Military Order: the Commander-in-Chief Power;<sup>128</sup> the AUMF; 10 U.S.C. § 821 (Article 21, UCMJ); and 10 U.S.C. § 836 (Article 36, UCMJ). Although Bush Administration officials

124. Although the U.S. Government had not employed military commissions since World War II, the Administration of George H. W. Bush briefly considered using commissions to try the bombers of Pan Am flight 103, which had detonated over Lockerbie, Scotland. See, e.g., YOO, *supra* note 5, at 204.

125. FDR issued two proclamations establishing military commissions. The first established the commission's jurisdiction and precluded judicial review of its decision. See Proclamation No. 2561, 7 Fed. Reg. 132, 5101 (July 7, 1942). The second named the eight defendants, the prosecutors, and the defense team as well as delineated the commission's structure. See Exec. Order No. 9185, 7 Fed. Reg. 132, 5103 (July 7, 1942). See generally Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes* 3-4 (John M. Olin Law & Econ. Working Paper No. 153, 2002), available at <http://www.law.uchicago.edu/Lawecon/index.html>.

126. See, e.g., LOUIS FISHER, CONG. RESEARCH. SERV., RL 31340, *MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 1* (2002) ("In creating a military commission (tribunal) to try the terrorists, President Bush modeled his tribunal in large part on a proclamation and military order issued by President Franklin D. Roosevelt in 1942, after the capture of eight German saboteurs."); *President Bush's Speech on Terrorism (Transcript)*, N.Y. TIMES, Sept. 6, 2006, at A1 ("Military commissions have been used by presidents from George Washington to Franklin Roosevelt . . .").

127. See *supra* note 11. See also Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) ("The [*Quirin*] case was not this Court's finest hour."); 2009 *Military Commissions Hearing before Armed Services*, *supra* note 65, at 15 (statement of Sen. Lindsey Graham) ("When you look at the history of military commissions, the World War Two German saboteurs trials is not exactly the showcase you would want to use."); Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 83 (1980) ("By going to such lengths to justify Roosevelt's proclamation, the Chief Justice, while preserving the form of judicial review, gutted it of substance."); David J. Danelski, *The Saboteur's Case*, J. OF SUPREME COURT HISTORY 1, 61 (1996) (characterizing the opinion as "a rush to judgment, an agonizing effort to justify a *fait accompli*," and an "institutional defeat" for the Supreme Court); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259, 1290-91 (2002) ("[T]here are reasons to discount the case itself as statutory precedent. . . . *Quirin* plainly fits the criteria typically offered for judicial confinement or reconsideration. . . ."); Glenn Sulmasy, *Ex Parte Quirin and Military Commissions Under the Obama administration*, 41 U. TOL. L. REV. 767, 768 (2010) ("The story of *Ex Parte Quirin* demonstrates why such commissions should not be used for al Qaeda fighters.").

128. U.S. CONST. art. II, § 2, cl. 1.

repeatedly drew parallels between President Bush's Military Order of November 13, 2001, and FDR's military order of July 2, 1942,<sup>129</sup> scrutiny of the two orders reveals significant dissimilarities.

First, the laws of war have undergone meaningful change since the trial of the Nazi saboteurs. As a result of the 1949 Geneva Conventions, treatment of enemy combatants has advanced significantly. Moreover, when FDR issued his Military Order, Congress had already declared war against foreign states. Consequently, under Justice Jackson's consequential tripartite framework for evaluating claims of executive power, FDR was arguably acting "pursuant to an express or implied authorization of Congress."<sup>130</sup> President Bush, conversely, could not point to a declaration of war. He did, however, cite the AUMF as a source of authority in his Military Order, although the AUMF never explicitly refers to the establishment of military commissions. In fact, the *Hamdan* Court would hold that in establishing commissions the President had exceeded congressional limits codified in Articles 21 and 36, UCMJ. Unlike FDR, whose authority was "at its maximum," President Bush was acting within "a zone of twilight."<sup>131</sup>

The Orders can further be distinguished with respect to scope. FDR's Order was unambiguous in two critical respects. First, there was no question as to whom the Order applied to, as FDR's second proclamation included the names of the eight saboteurs.<sup>132</sup> Moreover, there was little doubt as to the saboteurs' guilt.<sup>133</sup> These two facts - neither of which existed in the circumstances surrounding President Bush's Military Order - cannot be overemphasized. As Professors Goldsmith and Sunstein explain, the clear-cut scope and guilt of those to be tried served a powerful,

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129. See, e.g., Alberto R. Gonzales, Op-Ed., *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 ("The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt. . . ."); YOO, *supra* note 5, at 205 ("In fact, [President Bush's military order] read just like the order issued by President Franklin Roosevelt in 1942 . . .").

130. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

131. *Id.* at 637. See also *Hamdan v. Rumsfeld*, 548 U.S. 557, 639 (2006) ("If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action - a case within Justice Jackson's third category, not the second or first.").

132. See Exec. Order No. 9185, 7 Fed. Reg. 132, 5103 (July 7, 1942).

133. See, e.g., Goldsmith & Sunstein, *supra* note 125, at 14.

psychological role in legitimizing the FDR commissions.<sup>134</sup>

In stark contrast to FDR's military order, the scope of President Bush's order is indeterminate and potentially applies to a sweeping range of unidentified individuals.<sup>135</sup> The military order does not apply to U.S. citizens, although it could apply to the more than 20 million aliens residing in the United States.<sup>136</sup> The overbroad standard to bring noncitizens before a military commission is a Presidential determination that there is reason to believe an individual: was a member of al Qaeda (though he or she need not have participated in the 9/11 attacks); has engaged in, aided, abetted, or conspired in an act of international terrorism; or has harbored one of the aforementioned groups of individuals. As Professors Tribe and Katyal explain, "[t]he Order's terms sweep so broadly that they reach a Basque separatist who kills an American citizen in Madrid, or a member of the Irish Republican Army who threatens the American embassy in London."<sup>137</sup>

Finally, the Orders diverge in terms of offenses triable by military commission. FDR's order limited the offenses to those "who during time of war enter or attempt to enter the United States

134. *Id.* ("A vivid sense of the identity of the perpetrators could well heighten the sense that an expeditious proceeding is appropriate, and under the right conditions, such a sense could also weaken the protests of those who insist on what they see as procedural requirements.").

135. Section 2(a)(1) of the Military Order delineates those subject to the order and reads:

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) There is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaeda;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (1) or (ii) of subsection 2(a)(1) of this order . . .

Military Order, *supra* note 27, § 2(a)(1).

136. The Department of Homeland Security estimates that in 2010, the U.S. population included 8.1 million legal permanent residents. DEP'T OF HOMELAND SECURITY, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2010 1 (2011). The Congressional Research Service estimates that in 2008 the U.S. population included 11.9 million unauthorized aliens. ANDORRA BRUNO, CONG. RESEARCH SERV., R41207, UNAUTHORIZED ALIENS IN THE UNITED STATES 2 (2010).

137. Katyal & Tribe, *supra* note 127, at 1261.



... and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war."<sup>138</sup> The military order issued on November 13, 2001 did not include the substantive offenses with which to try terrorists. The Department of Defense released that document, Military Commission Instruction No. 2 (MCI2), Crimes and Elements for Trial by Military Commissions, on April 30, 2003.<sup>139</sup> MCI2 delineates eighteen substantive war crimes, eight other offenses triable by military commission, and seven additional forms of liability and related offenses, to include, *inter alia*, the inchoate crimes of conspiracy, solicitation, and attempt.<sup>140</sup> Providing MST is not listed as a crime in the MCI2. Although MCI2 states that "[t]hese crimes and elements derive from the law of armed conflict" the expansive range of substantive offenses, particularly inclusion of inchoate crimes, makes this claim questionable.<sup>141</sup>

Bypassing his interagency team, ignoring Congress, relying on dubious precedent, and seeking to further codify the Bush Doctrine in ambiguous yet sweeping language, the President's hastily written military order was the subject of intense criticism by constitutional lawyers,<sup>142</sup> international lawyers,<sup>143</sup> academia,<sup>144</sup> and the media.<sup>145</sup>

138. Proclamation No. 2561, 7 Fed. Reg. 132, 5101 (July 7, 1942).

139. Draft instructions were released on February 28, 2003. See generally DEP'T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2 (2003), available at <http://www.fas.org/irp/doddir/dod/milcominstno2.pdf>.

140. *Id.* §§ 6A-C.

141. *Id.* § 3A. See, e.g., KENNETH HURWITZ, HUMAN RIGHTS FIRST, TRIALS UNDER MILITARY ORDER: A GUIDE TO THE RULES FOR MILITARY COMMISSIONS 1-2 (2006) (Deborah Pearlstein ed.) ("Military Commission Instruction No. 2 expands the notion of "armed conflict" to include isolated incidents, and even attempted crimes. By doing this, crimes that traditionally have fallen outside military jurisdiction can now, for purpose of the military commissions, be included under the mantle of "laws of war."").

142. See, e.g., Katyal & Tribe, *supra* note 127, at 1266 (warning that President Bush's military order was unconstitutional as Congressional authorization was required by law to provide for trials of terrorists).

143. See, e.g., Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 338, 342, 344 (arguing that President Bush's military order undermines the nation's commitments to the rule of law, enervates our ability to lead an international campaign against terrorism, and endangers U.S. servicemembers).

144. Letter to the Honorable Patrick J. Leahy, Chairman, Senate Judiciary Comm. (Dec. 5, 2001), [http://www.law.yale.edu/documents/pdf/Public\\_Affairs/letterleahy.pdf](http://www.law.yale.edu/documents/pdf/Public_Affairs/letterleahy.pdf) (expressing the views of more than 250 law professors that the militarily order undermines the tradition of separation of powers and fails to

While much of this criticism has focused on challenges to civil liberties, the absence of procedural safeguards, separation of powers

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comply with constitutional and international standards of due process). For a listing of the original signatories to the letter, see <http://www.law.yale.edu/documents/pdf/origsig.pdf>.

145. See, e.g., Editorial, *A Travesty of Justice*, N.Y. TIMES, Nov. 16, 2001, at A24 (claiming that "President Bush's use of military tribunals would erode the very values he was trying to protect."); William Safire, Editorial, *Voices of Negativism*, N.Y. TIMES, Dec. 6, 2001, at A35 ("The sudden seizure of power by the executive branch, bypassing all constitutional checks and balances, is beginning to be recognized by cooler heads in the White House, Defense Department and C.I.A. as more than a bit excessive.").

Much of the criticism of President Bush's military order extends beyond the specific order to criticism in general of military commissions. Generally, proponents of commission argue that the emphasis the criminal justice system places on defendants' rights makes it incompatible with trying terrorists in Article III courts. See, e.g., Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18 ("U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language Miranda card from their kit bag. This is war, not a criminal case.").

On the other hand, opponents of military commission contend that federal courts are well-equipped to prosecute terrorists, as evidenced by the number of prosecutions achieved between September 11, 2001, and September 2011. See CTR. ON LAW AND SEC., N.Y. UNIV. LAW SCH., TERRORIST TRIAL REPORT CARD 2 (2011) ("Approximately 300 prosecutions, from 2001 to 2011, resulted in indictments related to jihadist terror or national security charges. Of the several hundred resolved cases in this category, 87% resulted in convictions, roughly the same conviction rate that we find for all federal criminal indictments."). See also RICHARD B. ZABEL & JAMES J. BENJAMIN JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, 2009 UPDATE AND RECENT DEVELOPMENTS 9 (2009) (Of the 289 defendants in their data set from September 12, 2001 to June 2, 2009, 91% received a conviction of any charge, either at trial or as a result of a guilty plea.).

Moreover, opponents of military commissions often contend that treating terrorists as combatants conveys a status of which they are undeserving. For example, in sentencing Richard C. Reid, the shoe bomber, to life imprisonment, Federal District Court Judge William G. Young discounted Reid's claim that he was a righteous warrior, admonishing, "[y]ou are not an enemy combatant, you are a terrorist. . . . You are not a soldier in any army, you are a terrorist. To call you a soldier gives you far too much stature."). Pam Belluck, *Threats and Response: The Bomb Plot; Unrepentant Shoe Bomber is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. TIMES, Jan. 31, 2003, at A13. See also *Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing before the S. Comm. on Armed Services*, 111th Cong. 41-42 (2009) (statement of Sen. Jack Reed) ("I think, just for the record, that there is a value to trying some of these individuals in civilian courts because they are criminals, and because when they try to claim a mantle of warrior, that is feeding into their appeal out in the greater Islamic world . . ."); Anne-Marie Slaughter, *Al Qaeda Should be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23 ("The trials will thus dignify terrorists as soldiers in Islam's war against America. This is exactly the wrong message to send. Al Qaeda members are international outlaws, like pirates, slave traders, or torturers.").

issues, and a lack of institutional independence, it has largely ignored a critical area – global due process – which will be considered in the next section.

### 3. *Global Due Process: The Geneva Debate*

This section considers what Professor Gerald R. Neuman has referred to as “global due process rights.” Global due process rights can be thought of as those rights to which all persons are entitled, either as a result of the extraterritorial application of U.S. Constitutional rights, ascension to international treaties by their states, or application of customary international law.<sup>146</sup> This section begins by surveying the international treaties to which the United States is a signatory as well as delineating the minimum due process rights necessary at a military commission. This section concludes that the 2009 MCA meets these international norms except in one key area.

This section next considers the Bush administration’s justification for application or non-application of such standards. While the Bush Administration initially determined that the Geneva Conventions would not apply to members of either al Qaeda or the Taliban, the Administration later modified this position. This section considers the intellectual foundations for nonapplication of the conventions and argues that the final determination represented a difference without distinction.

#### *a. Unpacking “A Regularly Constituted Court”*

Minimum due process requirements necessary at military commissions are derived from international agreements as well as customary international law.<sup>147</sup> The first source includes international treaties to which the United States is a signatory, notably the Geneva Conventions of 1949 and the International Covenant on Civil and Political Rights. These treaties are legally binding upon the United States.<sup>148</sup> The second source includes

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146. See generally Gerald L. Neumann, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 366 (2009); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L. J. 909, 920 (1991).

147. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (Am. L. Inst. 1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

148. U.S. CONST. art. VI, cl. 2.

customary international law, codified particularly in Article 75, Additional Protocol I to the Geneva Conventions. These norms are legally binding upon the United States as well.<sup>149</sup> Taken together, these sources of law contain interrelated fair trial standards applicable to military commissions.

The United States ratified the four Geneva Conventions in 1955.<sup>150</sup> The Conventions' myriad protections apply only to hostilities comprising an "armed conflict."<sup>151</sup> Hostilities falling short of a *de facto* armed conflict do not trigger application of the Conventions, but remain within the scope of municipal criminal law.<sup>152</sup> Indisputably, the 9/11 attacks constituted an armed attack, as evidenced by the responses of the international community.<sup>153</sup>

The Geneva Conventions apply in their entirety to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."<sup>154</sup> Conversely,

149. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that "international law is our law" so long as "there is no treaty and no controlling executive or legislative act or judicial decision"). See also Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 208 (2008) ("The understanding of the Founders and Framers that all persons are bound by the law of nations provides an important basis for recognition that the United States Congress, the executive branch, and the states are also bound by the law of nations.").

150. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; GPW, *supra* note 62; Civilian Convention, *supra* note 69.

151. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Int'l Comm. of the Red Cross Commentary (1960). [hereinafter Civilian Commentary].

152. See, e.g., Noelle Higgins, *The Application of International Humanitarian Law to Wars of National Liberation*, J. HUMANITARIAN ASSISTANCE (2004), available at <http://sites.tufts.edu/jha/files/2011/04/a132.pdf>.

153. See S.C. Res. 1368, ¶ 5, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (finding that the 9/11 attacks constituted a threat to international peace and security and recognizing the inherent right of individual or collective self-defense in accordance with Chapter VII of the Charter); Press Release, Statement by the North Atlantic Council (Sep. 12, 2001), available at [http://www.nato.int/cps/en/natolive/news\\_18553.htm?mode=pressrelease](http://www.nato.int/cps/en/natolive/news_18553.htm?mode=pressrelease) (invoking, for the first time in its storied history, Article V of the Washington Treaty, which states that an armed attack against one or more members shall be considered an attack against them all).

154. Civilian Convention, *supra* note 69, art. 2.

existence of an internal or noninternational armed conflict<sup>155</sup> between states and substate armed groups, "only triggers application of Common Article 3's 'mini convention' protections."<sup>156</sup> As discussed, the international armed conflict between the United States and Afghanistan likely terminated in June 2002.<sup>157</sup> Consequently, as the conflict can be characterized as a noninternational armed conflict, only the safeguards of Common Article 3 would apply to military commissions. Indeed, the *Hamdan* Court expressly held that Common Article 3 applies to the noninternational armed conflict with al Qaeda.<sup>158</sup> Similarly, U.S. policy dictates that all individuals held as detainees in the war on terror will receive the protections of Common Article 3.<sup>159</sup>

Among the protections afforded by Common Article 3 applicable to military commissions are due process requirements on state parties choosing to prosecute individuals during a time of

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155. Although Common Article 3 does not define the term "armed conflict not of an international character," the International Criminal Tribunal for the Former Yugoslavia provides substantial clarity. See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (holding that internal hostilities constitute an armed conflict if violence is 'protracted' as opposed to sporadic). Additionally, the 1977 Protocol II to the Geneva Conventions provides a functional definition of "armed conflict not of an international character." See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 1(2) 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter APII] ("This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflict.").

156. BOVARNICK ET AL., *supra* note 57, at 26; Civilian Convention, *supra* note 69, at art. 3.

157. See *supra* note 76.

158. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) ("The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to *Hamdan* because the conflict with al Qaeda, being international in scope does not qualify as a conflict not of an international character. That reasoning is erroneous.") (internal citations omitted). See also Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1168 (2007) ("By applying Common Article 3 of the Geneva Conventions to the noninternational armed conflict against al Qaeda, the Court effectively ruled that participants in this conflict do not fall outside the minimum scope of the benefits and obligations of binding international humanitarian law.").

159. Dep't of Def. Directive 2311.01E, DoD Law of War Program (May 9, 2006). See also Chairman of the Joint Chiefs of Staff Instruction 5810.01D, Implementation of the DoD Law of War Program (Apr. 30, 2010).

armed conflict. Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>160</sup> Although Common Article 3 never defines this phrase, the official commentary to the Conventions contemplates a prohibition of “summary justice.”<sup>161</sup>

At a minimum, “a regularly constituted court” must be independent and impartial.<sup>162</sup> These two requirements ensure that judges are not influenced by personal bias or prejudice.<sup>163</sup> Although human rights organizations have warned that trials of civilians by military courts would likely compromise independence and impartiality,<sup>164</sup> the history of military commissions in the war on terror resoundingly debunks this contention.<sup>165</sup>

160. Civilian Convention, *supra* note 69, art. 3(1)(d).

161. Civilian Commentary, *supra* note 151, at 38 (“We must be very clear about one point; it is only ‘summary’ justice which it is intended to prohibit. No sort of immunity is given to anyone under this provision.”). *See also Hamdan*, 548 U.S. at 734 (Alito, J., dissenting) (“Whatever else may be said about the system that was created by Military Commission Order No. 1 . . . this system – which features formal trial procedures, multiple levels of administrative review, and the opportunity for review . . . does not dispense ‘summary justice.’”).

162. Article 14 of the International Covenant on Civil and Political Rights holds that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 1719 signed by the United States on Oct. 5, 1977; ratified on June 5, 1992 [hereinafter ICCPR]. Additionally, GPW mandates that POWs be tried by courts offering “essential guarantees of independence and impartiality.” GPW, *supra* note 62, at art. 84. This obligation is further codified in Additional Protocol II. APII, *supra* note 155, at art. 6(2) (“No sentence shall be passed and no penalty shall be executed on a person found guilty of an offense except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.”).

163. *See, e.g.,* U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Slovakia*, ¶ 18 CCPR/C/79/Add.79 (Aug. 4, 1997), available at <http://www.unhcr.org/refworld/docid/3ae6b032c.html>.

164. *See, e.g.,* U.N. Human Rights Comm., *General Comment No. 32*, ¶ 22 CCPR/C/GC/32 (Aug. 23, 2007), available at <http://www.unhcr.org/refworld/docid/3ae6b032c.html> (“The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.”).

165. Of all the charges leveled at military commissions, perhaps the most unsupported is the contention that military judges and military defense counsel beholden to the executive would succumb to executive compulsion to unfairly convict defendants. The record resoundingly indicates that military judges have

While the *Hamdan* Court recognized the “general” nature of the Common Article 3 requirements, it held that the phrase “must be understood to incorporate at least the barest of those trial protections recognized by customary international law.”<sup>166</sup> In particular, the Court expressed grave concern with a “glaring” omission of a fundamental fairness – the right of an accused and his attorney to be present for his trial and to be privy to the evidence against him.<sup>167</sup> Military Commission Order No. 1 (MC1),<sup>168</sup> which governed the procedures for military commissions at the time, provided that an accused, as well as his civilian defense counsel, could be excluded from any portion of the trial proceeding.<sup>169</sup> This proved critical for the plurality,<sup>170</sup> which held that the military commissions convened by President Bush did not meet the minimum requirements of Common Article 3.<sup>171</sup> Rule 804 of the 2010 Manual for Military Commissions revises MC1 and expressly provides that the accused shall be present at “every stage of the

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scrupulously upheld the law and military defense counsel have zealously represented their unpopular clients. *See, e.g., Legal Issues Hearings, supra* note 13, at 22 (statement of LTC Darrel Vandeveld, USAR, former prosecutor at the Office of Military Commissions, Guantánamo Bay) (“Still, the judges at Guantanamo have displayed a remarkable independence that has clearly confounded the architects of the commissions system, who evidently believed that both the military judges and the commissions panel members would serve as little more than an ‘amen chorus. . . .’”). *See also* Newton, *supra* note 122, at 158 (“Defense attorneys have been widely lauded in both human rights circles and in the press as being diligent and dedicated in the defense of their clients.”); Patricia M. Wald, *Foreword to the Military Commission Reporter*, 12 GREEN BAG 2D 449, 451 (2009) (“Insofar as it is possible to evaluate the energy and stamina of defense counsel from the commissions’ rulings alone, it appears that they left no stone unturned in advocating for their unpopular clients.”).

166. *Hamdan*, 548 U.S. at 633.

167. *Id.* at 613-14.

168. The Department of Defense originally promulgated Military Commission Order No. on March 21, 2002. The Secretary of Defense amended the order on August 31, 2005. Dep’t of Def., Military Commission Order No. 1 (Aug. 31, 2005).

169. *Id.* § 6(B)(3) (noting that grounds for closure include, but are not limited to, protection of classified information).

170. Because Justice Kennedy agreed that the military commission to try Salim Hamdan was unauthorized under Articles 21 and 36, UCMJ, he determined there was “no need to decide whether Common Article 3 of the Conventions requires that the accused have the right to be present at all stages of a criminal trial” and did not join the plurality with respect to that section. *See Hamdan*, 548 U.S. at 564.

171. *Id.* at 635 (“Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless.”).

trial.”<sup>172</sup>

In contradistinction to the ambiguous language of common article 3, article 14 of the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, delineates an unambiguous list of trial protections for the accused. This list includes, *inter alia*, the presumption of innocence;<sup>173</sup> the right to be tried without undue delay;<sup>174</sup> the right to counsel;<sup>175</sup> the right to examine witnesses appearing against him and the right to have witnesses produced;<sup>176</sup> the right to have the free assistance of an interpreter;<sup>177</sup> the right against self-incrimination;<sup>178</sup> and the right to appeal to a higher tribunal.<sup>179</sup> The 2009 MCA<sup>180</sup> substantially

172. DEP'T OF DEF., 2010 MANUAL FOR MILITARY COMMISSIONS II-70 (2010) [hereinafter 2010 MANUAL FOR COMMISSIONS]. Rule 804 permits the proceeding to continue in the absence of the accused in three instances: for certain *in camera* and *ex parte* presentations (Rule 804a); removal for disruptive behavior after receiving a warning from the military judge (Rule 804b); and voluntary absence (Rule 804c-d).

173. ICCPR, *supra* note 162 art. 14(2).

174. *Id.* art. 14(3)(c).

175. *Id.* art. 14(3)(d).

176. *Id.* art. 14(3)(e).

177. *Id.* art. 14(3)(f).

178. *Id.* art. 14(3)(g).

179. *Id.* art. 14(5).

180. In the spring of 2009 President Obama declared his intention to revive military commissions with changes to the procedural rules. *See, e.g.,* Peter Finn, *Obama Set to Revive Military Commissions, Changes Would Boost Detainee Rights*, WASH. POST, May 9, 2009, at A01. President Obama signed the 2010 National Defense Authorization Act (NDAA) on October 28, 2010. *See* Press Release, The White House, Remarks by the President at the Signing of the National Defense Authorization Act for Fiscal Year 2010 (Oct. 28, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-signing-national-defense-authoriz-ation-act-fiscal-year-2010>. Included in the NDAA was an array of changes to the rules governing military commissions. On May 4, 2010, the Defense Department released a 281 page set of procedures for conducting commissions in accordance with the 2009 MCA. *See* 2010 MANUAL FOR COMMISSIONS, *supra* note 172. The 2009 MCA replaced and greatly reformed the 2006 MCA. While a detailed analysis of the two acts is beyond the scope of this article, the 2009 MCA significantly reformed the 2006 MCA in several key areas worth noting briefly.

First, the 2009 MCA replaced the phrase “unlawful enemy combatant” with the term “unprivileged enemy belligerent.” *See* 2009 MCA, *supra* note 19, at § 948a(7).

Second, while the 2006 MCA precluded defendants from invoking the Geneva Conventions as a source of rights, the 2009 MCA repeals this restriction. *See id.*, *supra* note 19, at § 947(g); 2009 MCA § 948b(e).

Third, while the 2006 MCA barred the use of statements obtained by torture as evidence in a trial, it authorized the use of statements obtained as a result of cruel, inhuman, or degrading treatment taken before enactment of the Detainee



complies with all of these guidelines.<sup>181</sup>

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Treatment Act (prohibiting inhumane treatment of detainees). See JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40752, THE MILITARY COMMISSIONS ACT OF 2006: BACKGROUND AND PROPOSED AMENDMENTS 23 (2009). Per the 2006 MCA, such statements were admissible if the military judge found that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value," and "the interests of justice would best be served by admission of the statement into evidence." 2006 MCA, *supra* note 19, at § 948r(d). The 2009 MCA unequivocally bars admissibility of such statements. See 2009 MCA, *supra* note 19, at 948r(a) ("No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.").

Fourth, while the 2009 MCA continues to authorize use of hearsay evidence, it significantly restricts admission. The 2006 MCA barred hearsay only "if the party opposing [it] demonstrate[d] that the evidence [was] unreliable or lacking probative value." 2006 MCA, *supra* note 19, at § 949a(b)(2)(E)(ii). The 2009 MCA places the burden of demonstrating reliability on the proponent of the evidence. ELSEA, *supra* note 180, at 27.

Fifth, the 2009 MCA includes provisions for capital cases to include appointment of at least one learned counsel. 2010 MANUAL FOR COMMISSIONS, *supra* note 172, at II-32.

While these changes are significant, the newfound legitimacy with which military commissions have been accorded is arguably due less to substantive changes than a change in presidential administrations and the general opprobrium the left had for President Bush's policies on Iraq and the war on terror. See, e.g., Chisun Lee, *Obama's Preventive Detention Problem: Breaking it Down*, PROPUBLICA BLOG (May 22, 2009, 4:38 PM), <http://www.propublica.org/article/obamas-preventive-detention-problem-breaking-it-down-522> (quoting U.S. Army Major General (Ret.) John Altenburg, Retired Deputy Judge Advocate General of the Army and appointing authority for military commissions, as stating "[T]he Bush administration's 'arrogance and naiveté' about public perception had tarnished the otherwise valid notion of detaining terrorism suspects under a wartime rationale [and . . .] allow[ed] critics to define the terms of the debate to be the terms of domestic criminal law. . . .").

181. 2009 MCA, *supra* note 19, § 949l(c)(1) ("that the accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt"); *id.* §948s ("The trial counsel assigned to a case . . . shall cause to be served upon the accused and military defense counsel a copy of the charges . . . sufficiently in advance of trial to prepare a defense."); *id.* § 948q(b) ("Upon the swearing of the charges . . . the accused shall be informed of the charges and specifications against the accused as soon as practicable."); *id.* § 949(c) (delineating the duties of defense counsel); *id.* § 948l(b) ("[T]he convening authority of a military commission . . . may detail to or employ for the military commission interpreters who shall interpret . . . for the accused"); *id.* § 948r(b) ("No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter."); *id.* §§ 950f-g (detailing appellate review by the United States Court of Military Commission Review; the United States Court of Appeals for the District of Columbia; writ of certiorari to Supreme Court).

In a timely new book, journalist William Shawcross explores the form of justice al Qaeda defendants should receive by considering the Nuremburg precedent. Shawcross, a journalist with significant progressive credentials and the son of

Despite its salutary advancements, the 2009 MCA bears a potentially ruinous resemblance to the 2006 MCA in a single critical respect – the charge of MST. In spite of reservations voiced by the Obama administration,<sup>182</sup> Congress chose not to eliminate the crime in the 2009 MCA. Consequently, despite the veritable enhancements the revised MCA has made, questions of legitimacy continue to haunt military commissions.<sup>183</sup>

The charge of MST will be considered in detail in Part II. Nonetheless, in discussing whether the revised military commission system comports with minimum global due process rights, a brief discussion is in order. Inclusion of the crime potentially constitutes retroactive punishment forbidden by the *ex post facto* clause,<sup>184</sup> codified in both the U.S. Constitution<sup>185</sup> and Article 75 of Additional

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Hartley Shawcross, the chief British prosecutor at Nuremberg, concludes that the military commissions of today afford significantly greater procedural due process rights than the Nuremberg trials ever contemplated. See SHAWCROSS, *supra* note 38, at 101 (“[Nuremberg] gave fewer rights to the accused than did the military commissions created in the United States during the Bush administration. Any German in the dock of Nuremberg would be astonished to learn of his rights, privileges, and entitlements if he were suddenly transferred . . . to the court in Guantánamo.”). See also Wells C. Bennett, *Book Review: Justice and the Enemy: Nuremberg, 9/11, and the Trial of Khalid Sheik Mohammed*, by William Shawcross, LAWFARE (Jan. 7, 2012, 1, 2011, 11:29 AM), <http://www.lawfareblog.com/2012/01/justice-and-the-enemy-nuremberg-911-and-the-trial-of-khalid-sheik-mohammed/>.

182. See, e.g., *Military Commissions, Before the S. Armed Services Comm.*, 111th Cong. 3 (2009) (submitted statement of David Kris, Assistant Attorney General) (“[T]here are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war.”)

183. See, e.g., JENNIFER ELSEA, CONG. RESEARCH SERV., R41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES 13 (2010) (“Similarly, defining as a war crime the ‘material support for terrorism’ does not appear to be supported by historical precedent.”).

184. The Supreme Court has held that there are three categories of *ex post facto* laws:

(1) a law that punishes as a crime an act previously committed, which was innocent when done; (2) a law that makes more burdensome the punishment for a crime, after its commission; or (3) a law that deprives one charged with a crime of any defense available according to law at the time when the act was committed.

*Collins v. Youngblood*, 497 U.S. 37, 37-38 (1990). See also ALEXANDER HAMILTON, THE FEDERALIST PAPERS 511 (Clinton Rossiter, ed., Signet Classics 2003) (“The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of law, and the practice of arbitrary imprisonments, have been, in all ages, the favorable and most formidable instruments of tyranny.”).

185. U.S. CONST., art. I, § 9, cl. 3.

Protocol I (API).<sup>186</sup> For example, the misconduct that resulted in Salim Hamdan's conviction of providing MST occurred between February, 1996 – November, 2001 – nearly five years before

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186. Article 75(4)(c) states in full:

[N]one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3.

Article 75 provides fundamental guarantees for individuals detained by the enemy during an international armed conflict. In his plurality opinion in *Hamdan*, Justice Stevens suggested that Article 75 elaborates the protections depicted in Common Article 3. *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006).

Although the United States is not a signatory to API, the fundamental guarantees of Article 75 arguably constitute customary international law. For example, a former Bush Administration State Department legal advisor has written:

More broadly, this customary law notion of fundamental guarantees found more expansive expression in Article 75 of Additional Protocol I to the Geneva Conventions. While the United States has major objection to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.

William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 321-22 (2003).

President Obama has stated that the United States will adhere to the guarantees of Article 75 "out of a sense of legal obligation." Upon signing E.O. 13567 (Periodic Review of Individuals Detained at Guantánamo Bay) the President made several important statements to include the following:

Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported.

Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

Press Release, The White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

codification of the charge in the 2006 MCA.<sup>187</sup> Construing the 2006 MCA to permit prosecutions for acts committed before its promulgation would result in a conflict between the MCA and international law, and a violation of the Charming Betsy Canon.<sup>188</sup> The DoD appears to be aware that the charge of MST is potentially problematic as section 950p(d) of the 2009 MCA appears to be an effort to withstand constitutional challenges on *ex post facto* grounds.<sup>189</sup>

Having surveyed the global due process rights mandated at a military commission, this article now considers the Bush Administration's controversial application of those rights.

*b. Application of the Geneva Conventions: A Difference Without Distinction*

Soon after the United States began detaining Taliban and al Qaeda members, the question arose as to what global due process rights they were entitled to. The answer initially provided by President Bush was far fewer rights than those required by international agreements. On January 18, 2002, the President determined that captured Taliban and al Qaeda members were not entitled to the protections of the Geneva Conventions.<sup>190</sup> The

187. See *United States v. Salim Ahmed Hamdan*, D-012, Def.'s Reply to Gov't Resp. to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction over Ex Post Factor Charges, 12, 15, Jan. 30, 2008, available at [http://www.mc.mil/Portals/0/pdfs/Hamdan%20\(AE098\).pdf](http://www.mc.mil/Portals/0/pdfs/Hamdan%20(AE098).pdf).

188. Pursuant to the doctrine, courts interpret ambiguous acts of Congress to avoid conflicts with international law. See, e.g., *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

189. The provision states in full:

EFFECT.— The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, as amended by the National Defense Authorization Act for Fiscal Year 2010, but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended.

2009 MCA, *supra* note 19, at § 950p(d).

190. See, e.g., Thom Shanker & Katharine Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12

Administration's decision was based on a belief that those individuals had not only forfeited their rights to the protections, but also that granting Taliban and al Qaeda members the safeguards would debase the conventions in the future.<sup>191</sup>

The decision was substantially shaped by a legal opinion originating in the Department of Justice's Office of Legal Counsel (OLC) on January 9, 2002. In that opinion, John Yoo and Robert Delahunty, a senior executive service official in OLC, provided the framework for a wholesale rejection of the applicability of the Geneva Conventions to the war on terror.<sup>192</sup> Although President Bush would modify his determination, the Yoo opinion serves as the analytical outline for the debate that ensued within the administration. A brief discussion of the memo is therefore useful.

The opinion is written in four parts. Part one examines the War Crimes Act (WCA)<sup>193</sup> of 1996 and relevant international treaties. Part two examines whether al Qaeda detainees may claim the protections of the Geneva Conventions. The opinion concludes that

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(claiming that "Mr. Bush's first decision to reject the conventions, reached in secret on Jan. 18 and never announced, was based on advice from the Justice Department and from the White House Counsel, Alberto Gonzales."). See also John Mintz, *Bush Shifts Position on Detainees; Geneva Conventions to Cover Taliban, but not al Qaeda*, WASH. POST, Feb. 8, 2008, at A01 ("The president decided on Jan. 18 to deny the captives coverage under the conventions and, more significantly, not to declare them prisoners of war.").

191. Marc A. Thiessen, a former Bush White House speechwriter, quotes Stephen Hadley, President Bush's second national security advisor, as explaining:

We defended the Geneva Conventions, and al Qaeda violated them in every respect. They would hide among civilians to protect themselves and they would kill innocent civilians to achieve their objectives. There could not be anything more inconsistent with international standards for how you conduct a conflict. And, in light of that, we were supposed to treat them like normal POWs? Why is that a humane, forward-thinking policy?

See, e.g., MARC A. THIESSEN, *COURTING DISASTER: HOW THE CIA KEPT AMERICA SAFE AND HOW BARACK OBAMA IS INVITING THE NEXT ATTACK* 31 (2010). *Contra* SHAWCROSS, *supra* note 38, at 117 ("If one accepts that terrorists like Khalid Sheikh Mohammed have deliberately eschewed the protections of the Geneva Conventions by refusing to act according to the laws of war, then there is an argument that they should be treated as criminals rather than as prisoners of war.").

192. Draft Memorandum for William J. Haynes II, General Counsel, Dep't of Defense from John Yoo, Deputy Assistant Attorney General, re. Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *available at* <http://www.slate.com/features/whatistorture/legalmemos.html> [hereinafter Yoo Memo].

193. The War Crimes Act criminalizes breaches of the Geneva Conventions, allowing the United States to prosecute war criminals in federal court. See War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified at 18 U.S.C. § 2401).

as a nonstate actor, al Qaeda “is not eligible to sign the Geneva Conventions.”<sup>194</sup> Consequently, “neither the Geneva Conventions nor the WCA regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict.”<sup>195</sup> Part three considers application of the Geneva Conventions to the Taliban. While this “presents a more difficult legal question” to the authors, they ultimately conclude that “Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban military, like al Qaeda, is therefore not entitled to the protections of the Geneva Conventions.”<sup>196</sup>

Having determined that positive law does not apply to al Qaeda or Taliban detainees in the war on terror, part four considers whether customary international law may provide the detainees with any such protections. The authors conclude that it does not, as “customary international law . . . does not bind the President, or restrict the actions of the United States military, because it does not constitute federal law recognized under the Supremacy Clause of the Constitution.”<sup>197</sup>

The day after President Bush’s determination, the Secretary of Defense ordered the Chairman of the Joint Chiefs of Staff to inform all combatant commanders that al Qaeda and Taliban individuals “are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949.”<sup>198</sup> Although Judge Advocates General (JAGs) had grave concerns that non-application of the conventions could imperil the safety of Service members in the future, JAGs were again shut out of the process.<sup>199</sup>

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194. Yoo Memo, *supra* note 192, at 11.

195. *Id.* at 2.

196. *Id.* at 14.

197. *Id.* at 2.

198. Memorandum for Chairman of the Joint Chiefs of Staff from the Sec’y of Def. Status of Taliban and Al Qaeda (Jan. 19, 2002), *available at* [http://lawofwar.org/Rumsfeld%20Torture%20memo\\_0001.jpg](http://lawofwar.org/Rumsfeld%20Torture%20memo_0001.jpg).

199. *See, e.g.*, YOO, *supra* note 5, at 35 (“Some, such as Senator Lindsey Graham (himself a JAG), have suggested that the JAGs were shut out of the decision process.”); ROBERT O. BOORSTIN, CTR. FOR AM. PROGRESS, MEMORANDUM ON THE GENEVA CONVENTIONS 1 (May 18, 2004), *available at* <http://www.americanprogress.org/issues/kfiles/b79532.html> (quoting Rear Admiral John Huston (Ret.), the Navy Judge Advocate General from 1997 to 2000, as saying, “[w]hen you say something down the chain of command like, ‘[t]he Geneva Conventions don’t apply, that sets the stage for the kind of chaos that we’ve seen.’). *But see* Shanker & Seelye, *supra* note 190, at A12 (noting that in time “Mr. Rumsfeld came to reflect the

The Administration's conclusions were the subject of criticism by the International Red Cross,<sup>200</sup> international allies,<sup>201</sup> human rights organizations,<sup>202</sup> the media,<sup>203</sup> members of the President's own Cabinet,<sup>204</sup> JAGs,<sup>205</sup> and the Chairman of the Joint Chiefs of Staff.<sup>206</sup> Within a week of Secretary Rumsfeld's diktat, White House Counsel Alberto Gonzales provided a memorandum to President Bush summarizing departmental conflicts regarding the decision not to grant Prisoner of War status to members of al Qaeda and the Taliban.<sup>207</sup>

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concerns of the Joint Chiefs of Staff, who rely on the Geneva Conventions to protect captured Americans, and was displeased by what he saw as the clumsy public release of the administration's decisions.").

200. See, e.g., Press Release, Int'l Comm. of the Red Cross, Geneva Convention on Prisoners of War (Feb. 9, 2002) (noting "[t]here are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status" and "[t]he ICRC remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime.").

201. See, e.g., McDonald & Sullivan, *supra* note 67, at 302 (noting international criticism of the decision "from a variety of sources"); Shanker & Seelye, *supra* note 190, at A12 (noting the decision complicated relations with European allies, particularly Britain and France).

202. See, e.g., Kenneth Roth, *Prisoners of War at Guantánamo: Bush Policy Endangers American and Allied Troops*, N.Y. TIMES, Mar. 5, 2002, available at [http://www.nytimes.com/2002/03/05/opinion/05iht-edroth\\_ed3\\_.html](http://www.nytimes.com/2002/03/05/opinion/05iht-edroth_ed3_.html) (Mr. Roth is the executive director of Human Rights Watch).

203. See, e.g., William Safire, *Colin Powell Dissents*, N.Y. TIMES, Jan. 28, 2002, at A21 ("Condi Rice's spokesman claimed the Gonzales memo was only a 'draft,' confirming suspicions that Gonzales signs off on half-baked memos and orders.").

204. BOORSTIN, *supra* note 199, at 1 ("Objections and warnings from Secretary of State Colin Powell, his legal advisor, and senior Pentagon officials were brushed aside.").

205. See *supra* notes 121 & 199.

206. Jack L. Goldsmith, a man with impeccable conservative credentials, who served in the Justice Department's Office of Legal Counsel has written:

The State Department vehemently opposed this argument. So did the Pentagon, where the normally mild-mannered Chairman of the Joint Chiefs of Staff, General Richard Myers, argued passionately against Yoo's position. He believed . . . that the Geneva Conventions were ingrained in U.S. military culture, that an American soldier's self-image is bound up with the Conventions, and that as we want *our* troops, if captured treated according to the Conventions, we have to encourage respect for the law by our own example.

JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 113-114 (2007) (internal citations omitted) (internal quotation marks omitted).

207. See Memorandum for the President From Alberto R. Gonzales on Decision

Gonzales begins his memo by reiterating the conclusions of the Yoo/Delahunt memo, namely that the Third Geneva Convention does not apply to the conflict with al Qaeda or the Taliban. In language that has become infamous, Gonzales writes, “[i]n my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.”<sup>208</sup> Gonzales next acknowledges that “[n]evertheless, you should be aware that the Legal Adviser to the Secretary of State has expressed a different view.”<sup>209</sup>

Secretary Powell wrote separately to Gonzales explaining “that the draft [memorandum] does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option.”<sup>210</sup> In his memo, Powell clearly presents the two options available to the President: the status quo (the conventions do not apply to the war on terror) or a determination that the Geneva Conventions do apply to the war on terror with POW status to be determined on a case-by-case basis in accordance with article 5, GPW.<sup>211</sup> The Third Geneva Convention, article 5, states in part:

Should any doubt arise as to whether persons, having committed

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Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban 2 (Jan. 25, 2002), available at <http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html> [hereinafter Gonzales Memo].

208. *Id.* When this quote originally appeared in a May 24, 2004, *Newsweek* article, the authors altered the quote by terminating it after the word “provisions.” The authors further failed to use an ellipsis to indicate the omission. As presented in the *Newsweek* article, the quote appears to indicate that Gonzales found the Geneva Conventions’ limitations on interrogations “quaint” – clearly not the case when the entire quote is presented. See John Barry et al., *The Roots of Torture: The Road to Abu Ghraib Began After 9/11, When Washington Wrote New Rules to Fight a New Kind of War*, *NEWSWEEK*, May 24, 2004, at 26 (“Gonzales concluded in stark terms: ‘In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.’”).

209. Gonzales Memo, *supra* note 207, at 1.

210. Memorandum to Counsel to the President, Assistant to the President for National Security Affairs from Colin L. Powell, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afg. 1 (Jan. 26, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf> [hereinafter Powell Memo].

211. *Id.*



a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>212</sup>

The President, however, had made a "group status determination" that article 5 tribunals could be dispensed with, as the detainees were all enemy combatants.<sup>213</sup> In his book *The Terror Presidency*, Jack Goldsmith, U.S. Assistant Attorney General for the OLC, decries this determination. He writes:

Whatever its legal merits, this was an inadequate response to concerns that particular *individuals* were not enemy fighters but instead were innocent farmers scooped up in Afghanistan. To the skeptical slice of American public and to most U.S. allies, it seemed as though a single and self-interested judge was consigning scores of people to indefinite detention without a modicum of due process.<sup>214</sup>

Secretary Powell elucidates a critical point in his memo that both Gonzales and Yoo appear to have misconstrued regarding GPW. The Bush Administration consistently argued that granting al Qaeda and/or Taliban members POW status would preclude the United States from effectively interrogating terrorists during the war on terror.<sup>215</sup> Powell essays to debunk this misperception.<sup>216</sup>

Article 17 of GPW states in part, "Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, person or serial number, or failing this, equivalent information."<sup>217</sup> Article 17 additionally mandates that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to

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212. GPW, *supra* note 62, art. 5. U.S. procedures for conducting an article 5 tribunal are laid out in Army Regulation 190-8. See DEP'T OF THE ARMY, ARMY REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINEES 2 (Oct. 1, 1997).

213. GOLDSMITH, *supra* note 206, at 118.

214. *Id.* at 118-19.

215. See, e.g., Shanker & Seelye, *supra* note 190, at A12 ("By denying captives full Geneva protections, the Administration said, it could more thoroughly interrogate them to uncover future terrorist plots . . .").

216. Powell Memo, *supra* note 210, at 2 ("Both [options] provide the same practical flexibility in how we treat detainees, including with respect to interrogation and length of the detention.") (emphasis added).

217. GPW, *supra* note 62, at art. 17.

secure from them information of any kind whatever.”<sup>218</sup> Consequently, Article 17 does not preclude, but merely proscribes, in accordance with customary international law and U.S. policy,<sup>219</sup> “legitimate U.S. efforts to interrogate terrorist suspects.”<sup>220</sup> As two practitioners explain:

Insisting that article 17 prohibits all forms of interrogations ignores the purpose and spirit behind the Third Geneva Convention and renders its protections counterproductive. Prohibitions on mental and physical abuse contained in the Third Geneva Convention should be strictly followed.... Thus, allowing some interrogation more accurately reflects the spirit and goals of the framers of the Third Convention. Instead of focusing on whether *any* questioning is allowed, the debate should concern permissible tactics of questioning under article 17.<sup>221</sup>

Powell’s memo cogently summarizes the pros and cons of the two options presented to the President. With respect to the dangers he perceived of maintaining the status quo, the former national security advisor and Chairman of the Joint Chiefs of Staff articulates the following policy rationales: (1) “it will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops”; (2) “It has a high cost in terms of negative international reaction”; (3) “it will undermine public support among critical allies”; (4) “Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including bringing terrorists to justice”; (5) “it may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops”; (6) “it will make us more vulnerable to domestic and international legal challenge and deprive us of important legal options.”<sup>222</sup>

Powell articulates a single, albeit illusory, advantage – “[t]his is

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218. *Id.*

219. See, e.g., DEP’T OF THE ARMY, U.S. ARMY FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS 5-26 (2006) (expressly prohibiting “[a]cts of violence or intimidation, including physical or mental torture, or exposure to inhumane treatment as a means of or aid to interrogation”). See also BOVARNICK ET AL., *supra* note 57, at 90 (“It’s not what you ask but how you ask it.”).

220. Roth, *supra* note 202.

221. McDonald & Sullivan, *supra* note 67, at 312.

222. Powell Memo, *supra* note 210, at 2.

an across-the-board approach that *on its face* provides maximum flexibility, removing any question of case-by-case determination for individuals.”<sup>223</sup>

Although Gonzales found Powell’s “arguments for reconsideration and reversal [to be] unpersuasive”<sup>224</sup> President Bush apparently concluded otherwise, executing a volte-face that had the curious effect of satisfying no one<sup>225</sup> and was itself the subject of further criticism.<sup>226</sup> On February 7, 2002, in an unscheduled press conference, Press Secretary Ari Fleischer announced that the President had decided that the Geneva Conventions would now apply to members of the Taliban but that under GPW, article 4,<sup>227</sup> they were not entitled to POW status. Fleischer further acknowledged that the change in policy would in no way alter treatment of members of the Taliban as they were already being treated humanely, prompting one reporter to label the announcement “a difference without distinction.”<sup>228</sup> Members of al Qaeda would continue to be outside the protections of the conventions but would also continue to be treated humanely.<sup>229</sup>

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223. *Id.* (emphasis added).

224. Gonzales Memo, *supra* note 207, at 3.

225. See, e.g., Katharine Seelye, *In Shift, Powell Asks Bush to Review Stand on War Captives*, N.Y. TIMES, Feb. 8, 2002, at A1 (“On the other side were Vice President Dick Cheney, Attorney General John Ashcroft, and Alberto Gonzales, the White House Counsel. Officials said that Secretary Powell had actually sought Geneva protection for both the Taliban and al Qaeda, and that Mr. Bush took the middle position.”).

226. See, e.g., Roth, *supra* note 202 (“The decision appears to reverse public statements by Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, and even President George W. Bush himself that the detainees in the Guantánamo Bay base in Cuba didn’t merit protection under the laws of war.”); Mintz, *supra* note 190, at A01 (quoting Professor Sean D. Murphy, an expert on the Geneva Conventions as saying, “I’m a little mystified by the decision. . . . The more you appear to say that people are not entitled to coverage under international rules, the more Washington risks endangering U.S. forces.”).

227. To qualify as a POW under article 4 an individual must satisfy the following four conditions: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; and (d) that of conducting their operations in accordance with the laws and customs of war.” GPW, *supra* note 62, art. 4(A)(2).

228. Press Release, The White House Office of the Press Sec’y, White House Press Sec’y Announcement of President Bush’s Determination Re Legal Status of Taliban and al Qaeda Detainees (Feb. 7, 2002), *available at* <http://www.state.gov/s/1/38727.htm>.

229. *Id.* For an argument that members of al Qaeda must be covered by the Civilians Convention if not covered by GPW, see HCJ 769/02 Pub. Comm. against

Although this revised policy generated considerable criticism from JAGs, their views were ignored once again.<sup>230</sup>

The announcement raised more questions than it answered. What protections, for example, would be accorded to a member of al Qaeda who had been integrated into the Taliban forces?<sup>231</sup> What precisely was meant by “humanely” as the President’s order neither defined the term nor provided subsequent guidance?<sup>232</sup> Also unanswered was whether the Administration intended to convene Article 5 tribunals as mandated by GPW in cases of doubt and advanced by Secretary Powell.<sup>233</sup> Finally, the announcement failed to indicate if the Taliban would be afforded protections under other conventions, such as the Fourth Geneva Convention protecting

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Torture in *Isr. v. Gov’t of Israel* [2005] (holding that international law recognizes two classes of persons – combatants and civilians. A third category of unlawful combatants has not yet been recognized by international law). *See also* *Prosecutor v. Delali*, Case No. IT-96-21-T, Judgment, ¶ 271 (Nov. 16, 1998) (“If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied.”).

Article 4 of the Fourth Geneva Convention explains the groups of civilians protected. The Commentary explains there are two main classes of protected persons: “(1) ‘enemy nations’ within the national territory of each of the Parties to the conflict, and (2) ‘the whole population’ of occupied territories (excluding nationals of the Occupying Power).” *Civilian Commentary*, *supra* note 151, at 46.

Civilians not protected include the following groups: (1) Nationals of a State which is not bound by the convention; (2) nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are; and (3) persons covered by one of the other three conventions. *Id.*

230. *See, e.g.*, COMM. ON ARMED SERVS., U.S. SENATE, INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY 3 (2008) [hereinafter ARMED SERVICES, 2008 INQUIRY]. The Armed Services Committee concluded:

Several military officers, including members of the Judge Advocate General (JAG) Corps, have described difficulties in interpreting and implementing the President’s February 7, 2002 order. A former Staff Judge Advocate (SJA) for the Joint Forces Command (JFCOM) stated that he thought the President’s order was a tough standard for the Department of Defense (DoD) to apply in the field because it replaced a well-established military doctrine (legal compliance with the Geneva Conventions) with a policy that was subject to interpretation. The President’s order was not, apparently, followed by any guidance that defined the terms “humanely” or “military necessity.” As a result, those in the field were left to interpret the President’s order. (citation omitted).

231. Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT’L L. 475, 478 (2002).

232. ARMED SERVICES, 2008 INQUIRY, *supra* note 230, at 3.

233. Murphy, *supra* note 231, at 478.

civilians (GCIV).<sup>234</sup>

Apart from the public infighting and reversals which marked the President's decision-making process, the decision not to grant POW status to members of the Taliban and al Qaeda, or at the very least to hold Article 5 tribunals, can be criticized on historical and policy grounds.

As Powell indicated in his memo to Gonzales, the Bush Administration's initial decision denying application of the Geneva Conventions to the war on terror "reverse[d] over a century of U.S. policy and practice . . . ."<sup>235</sup> A brief historical survey indicates that the United States has afforded, or been afforded, POW status in a number of ambiguous circumstances in which the applicability of GPW was in question.

During the Civil War, the United States was neither legally nor customarily required to treat Confederate soldiers as POWs.<sup>236</sup> The United States, and indeed, the rest of the world viewed the war as an "internal rebellion."<sup>237</sup> Consequently, the United States would have been within its legal rights to try Confederate Soldiers as guilty of treason, according them none of the protections as POWs. The Supreme Court endorsed this view in 1862, holding, "[t]hey have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors."<sup>238</sup> The better angels of our nature prevailed, however, and POW status was "accorded as a matter of grace."<sup>239</sup>

Similarly, during the Vietnam War, the United States treated the Vietcong as POWs as a matter of policy, although they arguably could not be said to have met the criteria of Article 4, GPW.<sup>240</sup>

Additionally, in December 1994, Chief Warrant Officer Two (CW2) Bobby Hall, a U.S. Army pilot, strayed into North Korean

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234. *Id.* at 479.

235. Powell Memo, *supra* note 210, at 2.

236. JAMES M. GILLISPIE, ANDERSONVILLES OF THE NORTH: THE MYTHS AND REALITIES OF NORTHERN TREATMENT OF CIVIL WAR CONFEDERATE PRISONERS 83 (2008).

237. *Id.*

238. The Brig Amy Warwick, 67 U.S. 635, 674 (1862).

239. *Id.* at 673.

240. See, e.g., MAJOR GENERAL GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964-1973 62 (1975) ("As indigenous offenders, the Viet Cong did not technically merit prisoner of war status, although they were entitled to humane treatment under Article 3, Geneva Prisoner of War Conventions.").

airspace on a routine flight and was shot down by North Korean air defense forces.<sup>241</sup> While the crash killed his co-pilot, CW2 Hall was taken into custody by the North Koreans.<sup>242</sup> Although there was a question whether an “armed conflict” existed between the United States and the DPRK, North Korea accorded CW2 Hall POW status and released him after 13 days.<sup>243</sup>

Finally, in October 1993, during the Battle of Mogadishu, Chief Warrant Officer Two (CW2) Michael Durant, a Blackhawk pilot, was shot down by a rocket-propelled grenade and captured by a group of Somalis loyal to warlord Mohammed Farah Aideed.<sup>244</sup> Although Aideed and his followers were not required to follow GPW as Somalia (like Afghanistan in 2001) was a failed state, the United States demanded assurances that Durant be treated consistently with the provisions of GPW.<sup>245</sup> Fearing international prosecution, Aideed agreed and although Durant was not technically granted POW status, his treatment was consistent with the protections of GPW during his 13 days of captivity.<sup>246</sup> In considering the case of CW2 Durant, two practitioners have written, “[i]f the Third Geneva Convention protections are binding on a Somali warlord, non-state parties must be granted the same protection.”<sup>247</sup>

Apart from worldwide condemnation, jeopardizing U.S. Servicemembers in future conflicts, and undermining the military commissions system, it is unclear what the United States achieved in its meandering, public controversy and ultimate determination regarding the applicability of the Geneva Conventions to the war on terror. As stated above, affording al Qaeda and Taliban members

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241. See Dan Sewell, *Pilot Freed by North Korea Makes It Home, Florida Town Jubilant at Return of Flier*, BOS. GLOBE, Dec. 31, 1994, at 3. See also Leanora Minai, *A Soldier's Story*, ST. PETERSBURG TIMES, Jan. 4, 1995, at 1A.

242. See *U.S. Copter Pilot Back in Florida Hall Tells Supporters He's Glad to Be Home, Extends his Sympathy to Dead Airman's Family*, DENVER ROCKY MOUNTAIN NEWS, Dec. 31, 1994, at 28A.

243. *POW/MIA Flag Replaces U.N. Banner*, S. FLA. SUN SENTINEL, Dec. 27, 1994, at 12A.

244. See MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* 333 (1999); Ellen Yan, *POW's Kin Hopes for His Safety*, NEWSDAY, Oct. 10, 1993, at 4. See generally MICHAEL J. DURANT, *IN THE COMPANY OF HEROES* (1996).

245. McDonald & Sullivan, *supra* note 67, at 310.

246. See *id.* See also Mark C. Hub, *U.S. Captive Says He's Well Treated; Somalis Provide Daily Medical Care*, WASH. POST, Oct. 9, 1993, at A01.

247. McDonald & Sullivan, *supra* note 67, at 310.

POW status would not hamper lawful interrogations.<sup>248</sup>

Similarly, an argument that the United States did not want to accord the terrorists behind 9/11 "combatant immunity"<sup>249</sup> can also be debunked. Perhaps the most critical protection offered by GPW is combatant immunity. The immunity is, in the words of Professor Derek Jinks, "often misunderstood."<sup>250</sup> In order to trigger combatant immunity, a POW must comply with the laws of war, for only *lawful* attacks on opposing military forces garner the protection of immunity.<sup>251</sup> An individual who perpetrates a war crime, a crime against humanity, or any terrorist act will not receive combatant immunity.<sup>252</sup> Consequently, as Professor Jinks explains, "[p]roperly understood, the scope of combatant immunity therefore underscores its relative insignificance on the policy front."<sup>253</sup>

There is, however, one perfectly valid reason for denying POW status to members of al Qaeda and the Taliban. Under GPW, article 102 entitles POWs to the same trial courts as the detaining power provides to its own military members.<sup>254</sup> Consequently, if an Article 5 tribunal determined an individual to be properly classified as a POW, the United States would be required to try that individual by

248. See *supra* text accompanying notes 217-21.

249. POWs may not be prosecuted for their lawful participation in hostilities. See, e.g., Major Geoffrey S. Corn & Major Michael L. Smidt, "To Be or Not to Be, That is the Question" *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW, June 1999, at 14. See also *Johnson v. Eisentrager*, 339 U.S. 763, 793 (1950) (Black, J., dissenting) ("It must be remembered that legitimate 'acts of warfare,' however murderous, do not justify criminal conviction. In *Ex parte Quirin*, we cautioned that military tribunals can punish only 'unlawful' combatants; it is no 'crime' to be a soldier.") (citations omitted). This provision is extra-conventional as GPW never specifically mentions the privilege. Nevertheless, it is considered to be customary international law. See, e.g., Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 376 (2004).

250. *Id.* at 422 ("Moreover, several developments – including the changing character of armed conflict and the general trajectory of humanitarian law . . . have diminished the importance of the privilege.").

251. *Id.* at 437.

252. See, e.g., Roth, *supra* note 202; Jinks, *supra* note 249, at 436.

253. *Id.* at 437.

254. Article 102 states in full:

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

GPW, *supra* note 62, art. 102.

court-martial rather than by military commission.<sup>255</sup> Curiously, this argument was never publicly advanced by the Bush Administration.

#### 4. *By The Numbers: An Assessment*

Between November 13, 2001, (the date of President Bush's order authorizing military commissions) and January 20, 2009 (the day President Bush left office), military commissions convicted three individuals. During that same period, federal courts convicted close to 300 individuals of terrorism offenses.<sup>256</sup> As Josef Stalin famously proclaimed, "quantity has a quality all its own,"<sup>257</sup> and while the dearth of convictions is not dispositive of a final judgment on commissions, such figures are relevant as part of an overall assessment. This analysis is particularly relevant as proponents of commissions have consistently advanced the argument that the federal courts are ill-equipped to handle terrorism charges.<sup>258</sup> This section considers the three cases brought before military commissions during the Bush Administration and offers an assessment.

The first person to be charged by military commission since World War II was David Hicks, a former kangaroo-skinner turned soldier of fortune, in June 2004.<sup>259</sup> In light of the Supreme Court's holding in *United States v. Hamdan* in 2006, charges had to be withdrawn and re-referred on February 7, 2007. Hicks had been captured in Afghanistan by the Northern Alliance and turned over to coalition forces in December, 2001.<sup>260</sup> The U.S. Government charged Hicks with one count of MST and one count of attempted murder in violation of the laws of war.<sup>261</sup> On March 30, 2007, Hicks

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255. The official commentary to article 102 provides:

The rules of the Convention therefore outweigh national legislation and the States party to the Convention must modify their own legislation if necessary, and in particular their military penal code, in order to respect the minimum standards set forth in Chapter III.

GPW Commentary, *supra* note 63, at 476 (internal citations omitted).

256. See, e.g., TERRORIST TRIAL REPORT CARD, *supra* note 145, at 2.

257. Talk: *Josef Stalin*, WIKIQUOTE, [http://www.en.wikiquote.org/wiki/Talk:Joseph\\_Stalin](http://www.en.wikiquote.org/wiki/Talk:Joseph_Stalin), (last visited Sept. 21, 2012).

258. See, e.g., *supra* note 145.

259. See *Hicks to Serve Nine Months' Jail*, BBC NEWS, Mar. 31, 2007, <http://news.bbc.co.uk/2/hi/americas/6512945.stm>; LEIGH SALES, DETAINEE 002: THE CASE OF DAVID HICKS XI (2007).

260. *Id.* at 270.

261. See AE002 Continuation to Military Comm'ns Form 458 (Charge Sheet),



pled guilty to the charge of MST. Although the military commission panel sentenced Hicks to seven years confinement, the Convening Authority reduced his sentence to nine months pursuant to his offer to plead guilty.<sup>262</sup> For political reasons Hicks was allowed to serve the remainder of his sentence in Australia.<sup>263</sup> Hicks was hardly an auspicious beginning for the military commission system. As one reporter wrote in *Harpers*:

In the end, the Hicks case paints a very sordid portrait of the Bush military commissions. His case was rushed forward for transparently political reasons: Australian Prime Minister Howard was facing growing anger among Australians over the Hicks case, and he acknowledges pressing the U.S. to bring the case on early and to bring it to a quick conclusion. This explains why the case was convened before the military commissions rules had even been completed.<sup>264</sup>

Salim Ahmed Hamdan, a Yemeni citizen, was captured by militia forces in Afghanistan on November 24, 2001, when a vehicle

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United States v. David Matthew Hicks (Feb. 2, 2007), *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

262. See AE027 Offer for a Pretrial Agreement & Appendix A to Offer for a Pretrial Agreement, at 1 & 6, United States v. David Matthew Hicks (Mar. 26, 2007), *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx>. In addition to capping Hicks's sentence at nine months, the Convening Authority agreed to dismiss specification 2 (attempted murder in violation of the law of war) with prejudice and the U.S. Government agreed to transfer Hicks to Australia no later than sixty days from the announcement of his sentence.

263. See, e.g., David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 2014 (2008) ("He was released from Guantánamo on a plea bargain – the result, apparently, of a political deal between Australian prime minister John Howard, who was hurting politically because of Hicks's prolonged detention, and Vice President Cheney.").

264. Scott Horton, *The Plea Bargain of David Hicks*, HARPER'S MAGAZINE, Apr. 2, 2007, *available at* <http://harpers.org/archive/2007/04/horton-plea-bargain-hicks>.

In contradistinction to Hicks's trial by military commission, John Walker Lindh pled guilty to substantially the same charge as Hicks in a U.S. district court in Alexandria, Virginia, on July 15, 2002. Lindh's guilty plea included a cap of 20 years confinement. See, e.g., *John Walker Lindh Pleads Guilty*, PBS NEWSHOUR (July 15, 2002, 12:45 PM), [http://www.pbs.org/newshour/updates/lindh\\_07-15-02.html](http://www.pbs.org/newshour/updates/lindh_07-15-02.html). On October 4, 2002, Judge T.S. Ellis, III sentenced Lindh to 20 years without possibility of parole. See, e.g., Guy Taylor, *Tearful Lindh Gets 20 Years for Fighting for Taliban, 'Shoe Bomber' Reid Pleads Guilty*, WASH. TIMES, Oct. 5, 2002, at A01. In 2007, specifically citing the lenient sentence Hicks received, Lindh's parents and attorneys – to no avail – appealed to President Bush to commute Lindh's sentence. See, e.g. Bob Egelko, *Lindh's Parents Seek His Freedom*, S.F. CHRON., Dec. 19, 2007, at B3; Adam Liptak, *A Case of Buyer's Remorse That Could Linger For Years*, N.Y. TIMES, Apr. 23, 2007, at A12.

he was driving containing anti-aircraft missiles was stopped by anti-Taliban forces.<sup>265</sup> Hamdan's captors turned him over to coalition forces who eventually transferred him to Guantánamo Bay, where he was held without charge for eighteen months.<sup>266</sup> On July 13, 2004, the government charged Hamdan with numerous terrorism-related charges, but before he could be tried, he filed a petition for habeas corpus in the U.S. District Court for the Western District of Washington on April 6, 2004.<sup>267</sup> Hamdan's case eventually reached the Supreme Court, which held that the military commission violated both the Uniform Code of Military Justice and the Geneva Conventions. Additionally, the Court held that Hamdan was entitled to the protection of Common Article 3 of the Geneva Conventions.<sup>268</sup>

On May 10, 2007, charges were withdrawn and re-referred under the newly convened 2006 Military Commissions Act, charging Hamdan with one specification of conspiracy and eight specifications of providing MST.<sup>269</sup> At Hamdan's military commission, the government evidence showed that Hamdan had attended an al Qaeda training camp, had served as bin Ladin's bodyguard and personal driver, to whom he had pledged *bayat* or unquestioned allegiance, and on numerous occasions delivered weapons and ammunition to an al Qaeda storage facility.<sup>270</sup>

During Hamdan's military commission he moved to dismiss the charge of MST, arguing the commission lacked subject matter jurisdiction over the charge as it was not a violation of the law of war.<sup>271</sup> While noting that the evidence establishing MST as a war crime "is mixed," the military judge ultimately rejected Hamdan's claim.<sup>272</sup> The military commission found Hamdan not guilty of the conspiracy charge but guilty of five of the specifications of

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265. Brief for the United States at 12-13, *United States v. Salim Ahmed Hamdan*, No. 11-1257 (D.C. Cir. Jan. 17, 2012) [hereinafter Gov't Brief, Hamdan].

266. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

267. *See, e.g.*, *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1259 (2011).

268. *Hamdan*, 548 U.S. at 557.

269. Gov't Brief, *Hamdan*, *supra* note 265, at 13.

270. *Id.* at 8-9.

271. *Id.* at 15.

272. D012 Ruling on Motion to Dismiss (Ex Post Facto) & D050 Def. Request to Address Supplemental Auth. at 5-6, *United States v. Salim Ahmed Hamdan* (July 14, 2008) [hereinafter *Hamdan*, Ruling on Motion to Dismiss] ("[T]he Commission is inclined to defer to Congress's determination that this is not a new offense.").

providing MST.<sup>273</sup> On August 7, 2008, the military commission sentenced Hamdan to 66 months of confinement, with the military judge awarding Hamdan confinement credit for 61 months.<sup>274</sup> Hamdan was transferred to his native Yemen and released in January 2009, where he currently resides with his family.<sup>275</sup>

Hamdan's conviction was automatically appealed to the United States Court of Military Commission Review. In its first direct appeal of a conviction by a military commission convened under the 2006 MCA, the court approved Hamdan's conviction on June 24, 2011.<sup>276</sup> Hamdan has appealed three issues<sup>277</sup> to the U.S. Court of Appeals for the District of Columbia.<sup>278</sup>

Days after the announcement of Hamdan's conviction, William Glaberson of *The New York Times* wrote:

The verdict in the first war crimes trial at Guantánamo Bay, Cuba, is in: One poorly educated Yemeni, with an impish sense of humor and two little girls, is guilty of supporting terrorism by driving Osama bin Laden. With credit for time served, the sentence is no more than five months. But the other, perhaps more important verdict – the judgment on the Bush administration's military commission system – is still out.<sup>279</sup>

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273. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1260 (2011). The convictions on the material support to terrorism charge consisted of providing material support to terrorists (as currently codified in 18 U.S.C. § 2339A) and providing material support to a designated foreign terrorist organization (as currently codified at 18 U.S.C. § 2339B). See Gov't Brief, *Hamdan*, *supra* note 265, at 14-15.

274. *Hamdan*, 801 F. Supp. 2d at 1260.

275. *Id.*

276. See Gov't Brief, *Hamdan*, *supra* note 265, at i-ii.

277. Hamdan claims that the military commission lacked subject matter jurisdiction over the charge of providing material support to terrorism as it is not a violation of the law of war. Hamdan additionally asserts that his conviction is a violation of the Ex Post Facto clause as Congress signed the 2006 MCA into law nearly five years after the alleged conduct occurred. Finally, Hamdan claims that 2006 MCA violates the Equal Protection Clause by subjecting aliens, and not U.S. citizens, to military commissions. *Hamdan*, 801 F. Supp. 2d at 1260.

278. *Salim Ahmed Hamdan v. United States*, CMCR-09-002 (2011), *appeal docketed*, No. 11-1257 (D.C. Cir. July 11, 2011). According to Charles Schmitz, Hamdan's interpreter at his military commission, it was important to Hamdan to clear the conviction because "[i]n Yemen they look at him as a criminal. He's been stained." See Jess Bravin, *White House Defends Use of War Crime Tribunals*, WALL ST. J., Jan. 26, 2010, available at <http://www.online.wsj.com/article/SB10001424052748704905604575027551871743276.html>.

279. William Glaberson, *A Conviction, but a System Still on Trial*, N.Y. TIMES, Aug. 10, 2008, at A27.

With Hamdan's appeal pending, this remains as true today as it did in 2008.

Ali Hamza Ahmad Suliman al Bahlul, a Yemeni citizen, allegedly served as Osama bin Laden's bodyguard and al Qaeda's media chief, producing propaganda videos.<sup>280</sup> Military prosecutors first charged al Bahlul in February 2004 with numerous terrorist-related charges. With passage of the 2006 MCA charges were withdrawn and re-referred in February 2008. At that time the Government charged al Bahlul with one count of conspiracy, alleging various acts; one count of solicitation to commit the same; and one count of providing MST.<sup>281</sup> Al Bahlul initially requested to represent himself, but then refused to defend himself at trial.<sup>282</sup> A military panel found al Bahlul guilty of all charges and sentenced him to life imprisonment.<sup>283</sup> Al Bahlul's conviction was automatically appealed to the Court of Military Commission

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280. See, e.g., Peter Finn, *Guantanamo Jury Sentences Bin Laden Aide to Life Term*, WASH. POST, Nov. 4, 2008, at A10. The video garnering the most attention was "The Destruction of the American Destroyer Cole" – an inflammatory film inciting jihad against the United States. See, e.g., *United States v. Ali Hamza Ahmad Suliman al Bahlul*, 820 F. Supp. 2d 1141, 1161 (U.S.C.M.C.R., 2011).

281. See Continuation to Military Comm'ns Form 458 (Charge Sheet), Ali Hamza Ahmad Suliman al Bahlul (Feb. 8, 2008), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

282. See Scott Higham, *Detainee Tells Hearing He was Member of Al Qaeda; Suspect Seeks to Represent Self in Military Proceeding*, WASH. POST, Aug. 27, 2004, at A03.

A preliminary matter the Court of Appeals for the District of Columbia had to decide was whether the appeal should be dismissed. The government had moved to disqualify defense counsel, thereby terminating the appeal, as evidence strongly suggested that Mr. al Bahlul had emphatically and repeatedly instructed his counsel not to file an appeal on his behalf. See, e.g., *Motion of the United States to Require Petitioner's Counsel to Demonstrate Auth. to Pursue the Appeal or, in the Alt., to Dismiss the Appeal at 2*, *United States v. Ali Hamza Ahmad Suliman al Bahlul*, No. 11-1324 (D.C. Cir. Oct. 31, 2011). In a reply to the government's motion, al Bahlul's counsel claimed that the "inquest into Mr. Bahlul's relationship with his counsel" should be rejected by the court as Mr. Bahlul understood the simple procedure to forfeit his appellate rights yet never did so. See *Response to the United States' Motion to Require Counsel to Demonstrate Auth. to Pursue Appeal or, in the Alt., to Dismiss, at 1-2*, *United States v. Ali Hamza Ahmad Suliman al Bahlul*, No. 11-1324 (D.C. Cir. Nov. 17, 2011). On February 6, 2012, a three-judge panel for the D.C. Circuit denied the Government's motion holding that "Respondent's evidence does not provide an adequate basis for the court to question counsel's authority to represent the petitioner in this case." *Ali Hamza Ahmad al Bahlul v. United States*, CMCR-09-001 (2011), No. 11-1324, Order, Document No. 1356724 (D.C. Cir. Feb. 6, 2012).

283. See, e.g., William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19.

Review, which upheld his conviction on September 9, 2011.<sup>284</sup> Al Bahlul has appealed his case to the U.S. Court of Appeals for the District of Columbia.<sup>285</sup>

Surveying the results of military commissions, Colonel Morris Davis, the third chief prosecutor in the Guantánamo military commissions, stated after al Bahlul's conviction, "In seven years we've managed to complete three trials: Hicks, Hamdan, and al Bahlul, or as I'd summarize it: a dupe, a driver, and a default. . . ."<sup>286</sup> Indeed, the only three commissions completed under the Bush Administration hardly instilled confidence in the system. Although President-elect Obama promised wholesale change, as the next section illustrates, this was easier said than done.

## ***B. The Obama Administration: Change Proves Elusive***

### *1. A Bipartisanship Approach to Bifurcation?*

In 2006, Senator Obama was one of thirty-four senators who voted against the 2006 MCA.<sup>287</sup> A former constitutional law professor, Senator Obama campaigned for the presidency on a promise of restoring America's image abroad,<sup>288</sup> closing the detention facility at Guantánamo Bay,<sup>289</sup> and governing as a transformative, post-partisan president.<sup>290</sup> It therefore came as little surprise that less than an hour after his inauguration, the President requested a stay on military commissions to reassess the scope of his authority to detain enemy combatants.<sup>291</sup>

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284. *United States v. Ali Hamza Ahmad Suliman al Bahlul*, 820 F. Supp. 2d 1141 (U.S.C.M.C.R. 2011).

285. *Ali Hamza Ahmad al Bahlul v. United States*, CMCR-09-001 (2011), *appeal docketed*, No. 11-1324 (D.C. Cir. Apr. 15, 2011).

286. Finn, *supra* note 280, at A10 (describing al Bahlul as a "default" because he did not defend himself).

287. S. 3930, 109th Cong., (2d Sess. 2006) (as amended), *available at* [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=2&vote=00259](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00259) (last visited Sept. 18, 2012).

288. *See, e.g.*, Dalia Sussman, *Poll Finds McCain Edge on Security*, N.Y. TIMES, Sept. 26, 2008, at A19.

289. *See, e.g.*, Steven Lee Myers, *Bush Decides to Keep Guantánamo Open*, N.Y. TIMES, Oct. 21, 2008, at A16.

290. *See, e.g.*, Ryan Lizza, *The Obama Memos: The Making of a Post-Partisan Presidency*, THE NEW YORKER, Jan. 30, 2012, *available at* [http://www.newyorker.com/reporting/2012/01/30/120130fa\\_fact\\_lizza](http://www.newyorker.com/reporting/2012/01/30/120130fa_fact_lizza).

291. *See Gherebi v. Obama*, 609 F. Supp. 2d 43, 52 (D.C. Cir. 2009).

Within two days of his inauguration, the President further issued three executive orders with significant ramifications for the treatment of detainees in the war on terror. E.O. 13,491 banned the use of enhanced interrogation techniques and mandated that treatment and interrogation of detainees apply the standards set forth in Army Field Manual 2-22.3.<sup>292</sup> E.O. 13,492 tasked the Executive branch with reviewing the individualized circumstances for the more than 240 detainees held at Guantánamo<sup>293</sup> and mandated the closure of the facility within a year.<sup>294</sup> Finally, E.O. 13,493 established a Special Interagency Task Force charged with identifying lawful options for the disposition of detainees apprehended in the war on terror.<sup>295</sup> While there is no denying that these actions, as well as enactment of the 2009 MCA, represented critical developments in military commissions and began the arduous transformation to a legitimate system, partisan politics and political miscalculations have all precluded the wholesale change President Obama and many of his supporters had believed possible.

## *2. From Complementarity to Competiveness*

On May 21, 2009, President Obama outlined his administration's approach to trying terrorist suspects in a symbolic speech at the National Archives, the home of the Constitution and the Declaration of Independence. The National Archives speech can be viewed as revealing both a critical component of the President's political philosophy, as well as the schisms that his ideology has produced with a key constituency.

President Obama has long had a complicated relationship with the far-left.<sup>296</sup> Feeling betrayed that the President would not entertain a truth and reconciliation commission proposed by Senator Patrick Leahy (D-VA) to investigate torture of enemy

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292. Exec. Order No. 13,491, § 3, 74 Fed. Reg. 4893 (Jan. 27, 2002) (revoking Exec. Order No. 13,440, 72 Fed. Reg. 40704 (July 24, 2007) (directing limited compliance with the Geneva Conventions in the treatment of detainees in the war on terror)).

293. Exec. Order No. 13,491, § 2(g), 74 Fed. Reg. 4897 (Jan. 27, 2002).

294. *Id.* at § 3.

295. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

296. See, e.g., Bob Burnett, *Will the Left Support Obama*, HUFFINGTON POST, Jan. 6, 2012, [http://www.huffingtonpost.com/bob-burnett/2012-will-the-leftsupport\\_b\\_1189102.html](http://www.huffingtonpost.com/bob-burnett/2012-will-the-leftsupport_b_1189102.html); Ben Johnson, *Left-Wing Blog: Should We Support Obama's Impeachment*, FLOYD REPORTS, Nov. 23, 2010, <http://floydreports.com/left-wing-blog-should-we-support-obamas-impeachment/> ("With Barack Obama's crimes against liberty becoming increasingly brazen, calls for his impeachment have intensified.").

combatants by Bush Administration officials,<sup>297</sup> segments of the left appear to have adopted former Prime Minister Margaret Thatcher's dictum that "consensus is the absence of principles."<sup>298</sup> While such a philosophy may have currency in a parliamentary system, for a post-partisan president who introduced himself to the national media by famously declaring there is not a red America or blue America but one United States of America,<sup>299</sup> consensus is the lifeblood of governing and at the very heart of President Obama's political philosophy<sup>300</sup> – a fact that has greatly complicated his

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297. See, e.g., Neil A. Lewis, *Senator Pushes Idea of Truth Commission*, N.Y. TIMES, Mar. 5, 2009, at A17. In his May 21, 2009 speech at the National Archives, President Obama explained:

I recognize that many still have a strong desire to focus on the past. When it comes to actions of the last eight years, passions are high. Some Americans are angry; others want to re-fight debates that have been settled, in some cases debates that they have lost. I know that these debates lead directly, in some cases, to a call for a fuller accounting, perhaps through an independent commission. I've opposed the creation of such a commission because I believe that our existing democratic institutions are strong enough to deliver accountability.

Press Release, The White House, Office of the Press Secretary, Remarks by the President on National Security (May 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09) [hereinafter National Archives Speech]. See also Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL'Y 271, 271 (2010) ("However, the subsequent Administration of President Barack Obama, although affiliated with a different party and on record as opposed to acts of torture sponsored by the previous Administration, has also declined to pursue prosecution of high-level members of the Bush administration.").

298. The full quote from Lady Thatcher reads:

Ah consensus . . . the process of abandoning all beliefs, principles, values and policies in search of something in which no one believes, but to which no one objects; the process of avoiding the very issues that have to be solved, merely because you cannot get agreement on the way ahead. What great cause would have been fought and won under the banner "I stand for consensus."

Bill Wink, *Consensus Equals Surrender: The Absence of Leadership*, AGENDA 21, Nov. 8, 2007, available at <http://www.middletownca.com/CONSENSUS-EQUALS-SURRENDER.htm> (quoting Prime Minister Margaret Thatcher).

299. In his keynote address before the 2004 Democratic National Convention, senatorial candidate Obama rejected the division of the United States into red and blue states. See *The Media and the Message, Excerpts from Speeches on Broad Variety of Issues at the Convention in Boston*, N.Y. TIMES, July 28, 2008, at P8.

300. See, e.g., RON SUSKIND, *CONFIDENCE MEN: WALL STREET, WASHINGTON, AND THE EDUCATION OF A PRESIDENT* 25 (1st ed. 2011) ("[Obama's] instincts were always to push for consensus, and then affirm it, usually with some trenchant shift that would make it his own."). See also JODI KANTOR, *THE OBAMAS* 322 (1st ed. 2012) ("It

relationship with the left.<sup>301</sup> The National Archives speech is illustrative. While the speech includes soaring rhetoric affirming the vitality of the rule of law, one announcement in particular infuriated the President's increasingly disaffected supporters on the left.

In his speech, President Obama repeatedly returns to the mantra that there is no conflict between liberty and security.<sup>302</sup> As Jodi Kantor, author of *The Obamas* writes, "It was a classic Obama statement, following the same theme as his 2004 convention speech about red and blue America; once again, he was promising to resolve what seemed to be irresolvable."<sup>303</sup>

The policy delineated in the National Archives speech endorses a bifurcated approach to trying suspected terrorists and distinguishes five distinct groups of detainees. The first group includes those who have violated criminal laws and should properly be tried in federal courts; the second group includes those who have violated the laws of war and should be tried in reformed military commissions; the third group includes 21 detainees whom the courts had ordered released; the fourth group includes detainees whom the Administration had determined can be safely transferred to other countries.<sup>304</sup>

The fifth group – "the single toughest issue that we will face" – includes detainees who cannot be prosecuted because evidence may be tainted, but continue to pose a clear danger to the United States.<sup>305</sup> For this group, the President announced a policy of prolonged (preventive) detention, allowing authorities to hold

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was the same problem his wife had worried about for years: her husband was a believer and a conciliator; he seemed to have a kind of optimistic bias, trusting things would work out.").

301. The President's penchant for consensus and finding common ground with those whom he disagrees was on display as early as the inauguration when the President chose Evangelical Pastor Rick Warren to deliver the inaugural invocation. The move infuriated many of the President's liberal supporters. See, e.g., Alexander Mooney, *Obama's Inaugural Choice Sparks Outrage*, CNN, Dec. 17, 2008, available at [http://articles.cnn.com/2008-12-17/politics/obama.warren\\_1\\_gay-marriage-gay-equality-gay-rights-proponents?\\_s=PM:POLITICS](http://articles.cnn.com/2008-12-17/politics/obama.warren_1_gay-marriage-gay-equality-gay-rights-proponents?_s=PM:POLITICS).

302. See, e.g., National Archives Speech, *supra* note 297 ("But I believe with every fiber of my being that in the long run we also cannot keep this country safe unless we enlist the power of our most fundamental values.").

303. KANTOR, *supra* note 300, at 105.

304. National Archives Speech, *supra* note 297.

305. *Id.* ("These are people who, in effect, remain at war with the United States.").



detainees at Guantánamo without charges.<sup>306</sup> Well aware of the outcry this policy would provoke with the left, the President convened an awkward White House meeting with a dozen law professors and leaders of civil liberties and human rights groups the day before his National Archives speech.<sup>307</sup> According to one participant, when the President informed his guests that he was considering indefinite detention for particular detainees, it was an "'oh my God' moment."<sup>308</sup> Once again, the left was infuriated with the President.<sup>309</sup>

While the President's "preventive detention" policy garnered the most attention from the press, the more important announcement concerned the bifurcated approach with a preference for criminal trials in domestic courts.<sup>310</sup> This has been easier said

306. *Id.* ("Let me repeat: I am not going to release individuals who endanger the American people.").

307. KANTOR, *supra* note 303, at 105 ("The encounter was uncomfortable from the start. The visitors felt betrayed by the president."). See also Sheryl Gay Stolberg, *Obama is Said to Consider Preventive Detention Plan*, N.Y. TIMES, May 21, 2009, at A18.

308. KANTOR, *supra* note 303, at 107.

309. See, e.g., *Human Rights Attorney Vince Warren: Obama's "Preventive Detention" Plan Goes Beyond Bush Admin Policies*, DEMOCRACY NOW!, May 22, 2009, available at [http://www.democracynow.org/2009/5/22/vince\\_warren](http://www.democracynow.org/2009/5/22/vince_warren) (quoting Warren, Executive Director of the Center for Constitutional Rights and participant at the May 20, 2009 White House meeting as saying, "The problem is that he goes out the next day, and he has a speech in which he not only embraces the opposition, meaning George Bush's policies, but then he comes out with things that even George Bush didn't come out with, like preventive detention."). See also Margaret Talev & David Lightman, *Obama Outlines Plans for Guantánamo Detainees*, MCCLATCHY NEWS, May 21, 2009, available at <http://www.mcclatchydc.com/2009/05/21/68608/obama-outlines-plans-for-guantanamo.html> (quoting Kenneth Roth, executive director of Human Rights Watch, as saying, "President Obama wrapped himself in the Constitution and then proceeded to violate it by announcing he would send people before irredeemably flawed military commissions and seek to create a preventive detention scheme that only serves to move Guantánamo to a new location and give it a new name."); Lee, *supra* note 180 ("Holding prisoners at Guantánamo, without the certainty of trial or release, was a defining feature of the previous administration's counterterrorism policy - and some of its fiercest critics expected Obama to change the policies.").

310. The criteria the Obama Administration sought to employ in choosing the proper venue appears to date back to a July 2009 Justice Department memo entitled "Determination of Guantánamo Cases Referred for Prosecution." While acknowledging that referred cases will typically be prosecuted in federal courts, the DoJ guidance notes that the inquiry to try cases in a reformed military commission will turn on the following three factors: strength of interest (to include the location in which the offenses occurred); efficiency (to include foreign policy concerns and resource concerns); and a variety of other prosecution considerations. DEP'T OF JUSTICE, *Determination of Guantánamo Cases Referred for Prosecution* (2009),

than done, however. The debacle over where to try Khalid Sheik Mohamed (KSM) – the man the 9/11 Commission Report described as “the principal architect of the 9/11 attacks”<sup>311</sup> – illustrates the challenges to bipartisan bifurcation. Attorney General Eric Holder initially determined that KSM would be tried in the federal courthouse in Manhattan. Later claiming that the trial would be “the defining event of my time as attorney general,”<sup>312</sup> Holder appeared before the Senate Judiciary Committee on November 18, 2009, to explain his controversial decision. The Attorney General testified that both the federal courts and military commissions have a viable role to play in the war on terror and as a prosecutor he would determine the venue based upon the evidence.<sup>313</sup>

In April 2011, succumbing to congressional restrictions limiting funds to transfer Guantánamo detainees to the United States, the Administration reversed course and announced that KSM would be tried by military commission. The Attorney General explained:

We must face a simple truth: those restrictions are unlikely to be

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<http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf>.

311. See 9/11 REPORT, *supra* note 37, at 145. In addition to his role as the mastermind behind 9/11, a three-year investigation concluded by Georgetown University in 2011 confirmed that KSM had executed *Wall Street Journal* reporter Daniel Pearl in Pakistan in 2002. See, e.g., Peter Finn, *Khalid Sheik Mohammed Killed U.S. Journalist Daniel Pearl, Report Finds*, WASH. POST, Jan. 20, 2011, <http://www.washingtonpost.com/wpdyn/content/article/2011/01/20/AR2011012000057.html>.

Following KSM’s Combatant Status Review Tribunal Hearing on March 10, 2007, the Pentagon released the verbatim transcript. During that tribunal, KSM boasted that “I decapitated with my blessed right hand the head of the American Jew, Daniel Pearl, in the city of Karachi, Pakistan. For those who would like to confirm, there are pictures of me on the Internet holding his head.” DEP’T OF DEF., Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024, Mar. 10, 2007, [http://www.defense.gov/news/transcript\\_isn10024.pdf](http://www.defense.gov/news/transcript_isn10024.pdf).

During his hearing, KSM additionally claimed that, among other actions, “[he] was responsible for the 1993 World Trade Center Operation”; “[he] was responsible for the Shoe Bomber Operation to down two American airplanes”; “[he] was responsible for surveying and financing the assassination for several former American Presidents, including President Carter”; and “[he] was responsible for planning to destroy the Sears Tower by burning a few fuel or oil tanker trucks beneath or around it.” *Id.*

312. Jane Mayer, *Eric Holder and the Battle over Khalid Sheik Mohammed*, THE NEW YORKER, Feb. 15, 2010, available at [http://www.newyorker.com/reporting/2010/02/15/100215fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer).

313. Press Release, U.S. DEP’T OF JUSTICE, Attorney General Eric Holder Testifies Before the Senate Judiciary Committee, (Nov. 18, 2009), <http://www.justice.gov/ag/testimony/2009/ag-testimony-091118.html>.

repealed in the immediate future . . . . And we simply cannot allow a trial to be delayed any longer for the victims of the 9/11 attacks or for the families who have waited nearly a decade for justice.<sup>314</sup>

In July 2011, President Obama appointed Brigadier General (BG) Mark Martins, a man he had served with on the *Harvard Law Review*, as the sixth chief prosecutor of the military commissions in seven years.<sup>315</sup> BG Martins recently underscored his commitment to a bifurcated approach on December 1, 2011, in a keynote address at the American Bar Association's annual review of national security law.<sup>316</sup>

Congress, however, has been unwilling to endorse a bipartisan approach to bifurcation.<sup>317</sup> The 2011 National Defense

314. Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

315. BG Martin's appointment received widespread praise. Jack Goldsmith wrote on the *Lawfare* blog:

I think this is an inspired choice, and not just (or even mainly) because of Martins' sterling resume. As much as anyone I know, Martins has thought deeply about military commissions . . . and most importantly the need for commission trials to be conducted in a manner that is legitimate and widely perceived to be so. Some will draw analogies to Robert Jackson's prosecutorial efforts at the Nuremberg Military Tribunal, but in truth Martins faces a more daunting legitimating task than Jackson did.

Jack Goldsmith, *Mark Martins to be Chief Prosecutor, Military Commissions*, LAWFARE (June 23, 2011, 5:38 PM), <http://www.lawfareblog.com/2011/06/mark-martins-to-be-chief-prosecutor-military-commissions/>.

General David Petraeus (Ret.) similarly extolled BG Martins's appointment, claiming, "Martins believes in military commissions being responsible, effective institutions within our larger system of national security institutions. Extraordinary. Truly impressive." See Willy Stern, *Rebrander in Chief*, WEEKLY STANDARD, Oct. 3, 2011, at 14. On his popular blog, Hugo Dixon, a former editor of the *Financial Times* claimed, "[i]f anybody can provide a measure of legitimacy to the trials of detainees in Guantanamo Bay, Brigadier General Mark Martins may be that person." See Hugo Dixon, *Guantánamo's Detox Man* (Oct. 4, 2011, 13:28 EDT), <http://blogs.reuters.com/hugo-dixon/2011/10/04/guantanamos-detox-man/>.

316. Benjamin Wittes, *Remarks of Brigadier General Mark Martins, Chief Prosecutor, Military Commissions, Keynote Address at the American Bar Association's 21st Annual Review of the Field of National Security Law*, LAWFARE (Dec. 1, 2011, 7:30 PM), <http://www.lawfareblog.com/2011/12/mark-martins-remarks-at-aba/> (acknowledging that while federal courts would often be the best venue for practical purposes, certain cases implicate significant national security interests and would be best tried in a reformed military commission).

317. While some argue that Congressional actions amount to little more than partisan politics in an election year, others point to the case of Ahmed Ghailani as "stiffening resistance to civilian trials." See, e.g., Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1. The Ghailani case has

become a political Rorschach test, with both the far right and the far left using the case to justify their extremist views.

Ahmed Khalfan Ghailani was the first detainee held at Guantánamo Bay to be tried in a civilian court. Ghailani was tried in the United States District Court for the Southern District of New York in June 2009 for his involvement in the 1998 bombings of the U.S. Embassies in Dar Es Salaam, Tanzania, and Nairobi, Kenya, which killed 224 people and injured thousands. *See, e.g., United States v. Ghailani*, 761 F. Supp. 2d 167, 168 (S.D.N.Y. 2011). On November 17, 2010, a jury found Ghailani guilty of one charge of conspiracy to destroy government property but acquitted him of 284 counts of murder and conspiracy. *See, e.g., Clyde Haberman, Verdict Replies to Terrorists and to Critics*, N.Y. TIMES, Jan. 28, 2011, at A24. The acquittals resulted, in part, from a decision by the District Court Judge, Lewis A. Kaplan, to exclude a key prosecution witness as “fruit of the poisonous tree.” The witness would have testified that he had sold Ghailani the explosives but was only discovered by the Government after interrogators subjected Ghailani to coercive interrogation techniques. *See Charlie Savage, U.S. Prepares to Lift Ban on Guantánamo Cases*, N.Y. TIMES, Jan. 20, 2011 at A1. Although Judge Kaplan sentenced Ghailani to life without parole and “the same evidentiary problems that impeded his prosecution in federal court would likely have arisen in a military commission,” the case of Ahmed Ghailani has become a cause célèbre to those who argue that that federal courts should play no role in prosecuting terrorists. *See, e.g., Benjamin Wittes, The Politics of the Ghailani Verdict*, LAWFARE (Nov. 17, 2010, 11:14 PM), <http://www.lawfareblog.com/2010/11/the-politics-of-the-ghailani-verdict/>.

The question of whether a military commission could have fared better, particularly in light of the commission’s unimpressive record, as well as the fact that Ghailani will spend the rest of his life in a super-max facility is often lost in the debate in favor of sheer bombast. For example, the incoming Chairman of the House Homeland Security Committee, Representative Peter King (R-N.Y.) proclaimed the following upon learning of the acquittals:

I am disgusted at the total miscarriage of justice today in Manhattan’s federal civilian court. In a case where Ahmed Khalfan Ghailani was facing 285 criminal counts, including hundreds of murder charges, and where Attorney General Eric Holder assured us that ‘failure is not an option,’ the jury found him guilty on only one count and acquitted him of all other counts including every murder charge. This tragic verdict demonstrates the absolute insanity of the Obama administration’s decision to try al-Qaeda terrorists in civilian courts.

John McCormack, *Peter King Rips Obama on Ghailani Verdict*, WEEKLY STANDARD, (Nov. 17, 2010, 7:54 PM), [http://www.weeklystandard.com/blogs/peter-king-rips-obama-ghailani-verdict\\_518137.html](http://www.weeklystandard.com/blogs/peter-king-rips-obama-ghailani-verdict_518137.html).

Not to be outdone by the far right, the far left issued its own indictment of the process. The Center for Constitutional Rights issued the following statement:

CCR questions the ability of anyone who is Muslim to receive a truly fair trial in any American judicial forum post-9/11. Both the military commission system and federal criminal trials have serious flaws. However, on balance the Ghailani verdict shows that federal criminal trials are far superior to military commissions for the simple yet fundamental reason that they prohibit evidence obtained by torture. If anyone is unsatisfied with Ghailani’s acquittal on 284 counts, they should blame the CIA agents who tortured him.

*Center for Constitutional Rights Responds to Ghailani Verdict*, CRT. FOR CONSTITUTIONAL

Authorization Act (NDAA), signed into law on January 7, 2011, prohibited any authorized funds to the DoD from being used to transfer detainees held at Guantánamo Bay to the United States for any purpose.<sup>318</sup> Section 1032 of the 2011 NDAA reads in full:

None of the funds authorized to be appropriated by this Act for fiscal year 2011 may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee who – (1) is not a United States citizen or a member of the Armed Forces of the United States; and (2) is or was held on or after January 20, 2009, at United States Naval Station.<sup>319</sup>

The purpose of this provision was to preclude prosecution of detainees currently held at Guantánamo in Article III courts.<sup>320</sup> Because the bill authorized billions of dollars for the wars in Iraq and Afghanistan, the President chose not to veto it.<sup>321</sup> In signing the Act, the President sharply criticized the Congress and vowed to seek its repeal:

Section 1032 represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests. The prosecution of terrorists in Federal court is a powerful tool in our efforts to protect the Nation and must be among the options available to us. Any attempt to deprive the executive branch of that tool undermines our Nation's counterterrorism efforts and has the potential to harm our national security.<sup>322</sup>

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RIGHTS, Nov. 17, 2010, <http://ccrjustice.org/Ghailani-verdict>.

318. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R40754, GUANTÁNAMO DETENTION CENTER: LEGISLATIVE ACTIVITY IN THE 111TH CONGRESS 5 (2011).

319. 2011 NDAA, *supra* note 32, § 1032.

320. See, e.g., 156 Cong. Rec. § 10937 (Dec. 22, 2010) (statement by Sen. Patrick Leahy) (expressing that he was “deeply concerned that this section takes away one of the greatest tools we have to protect our national security – our ability to prosecute terrorism defendants in Federal courts.”). See also David B. Rivkin, Jr., & Lee A. Casey, *The Wrong Way to Stop Civilian Terror Trials*, WALL ST. J., Dec. 21, 2010, at A17 (“Conditioning federal appropriations so as to force the president to exercise his prosecutorial discretion in accordance with Congress’s wishes rather than his own violates the Constitution’s separation of powers ability to prosecute terrorism defendants in Federal courts.”).

321. See Charlie Savage, *New Measure to Hinder Closing of Guantánamo*, N.Y. TIMES, Jan. 8, 2011, at A11.

322. Press Release, Statement by the President on H.R. 6523, 111th Cong. (Jan. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523>.

The 2012 NDAA, signed into law by the President on December 31, 2011, contains similar provisions. Section 1032 of the law mirrors the prohibition on the use of authorized funds for the transfer of detainees at Guantánamo Bay to the United States, as originally included in section 1032 of the 2011 NDAA.<sup>323</sup> Although section 1028 authorizes the President to grant a waiver for a detainee to be brought to the United States for trial in federal court, as *The New York Times* wrote in a recent editorial, “the legislation’s ban on spending any money for civilian trials for any accused terrorist would make that waiver largely meaningless.”<sup>324</sup> Despite threats of vetoing the legislation, the President ultimately chose to sign the law.<sup>325</sup> In a statement issued by the White House on December 31, 2011, the President expressed frustration with those in Congress seeking to bar his bifurcated approach:

Section 1027 renews the bar against using appropriated funds for fiscal year 2012 to transfer Guantánamo detainees into the United States for any purpose. I continue to oppose this provision. . . . For decades, Republican and Democratic administrations have successfully prosecuted hundreds of terrorists in Federal court. Those prosecutions are a legitimate, effective, and powerful tool in our efforts to protect the Nation. Removing that tool from the executive branch does not serve our national security.<sup>326</sup>

### 3. *By the Numbers: An Assessment*

Since commissions were restarted in the spring of 2010, as of this writing four detainees have pled guilty under the revised Military Commissions Act (MCA) of 2009. The government initially charged Ibrahim Mahmoud al Qosi on February 8, 2008, with conspiracy, alleging various objects, and providing MST.<sup>327</sup> On July 7, 2010, al Qosi pled guilty to both charges.<sup>328</sup> The military

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323. 2012 NDAA, *supra* note 32, § 1028.

324. Editorial, *Politics over Principle*, N.Y. TIMES, Dec. 15, 2011, available at <http://www.nytimes.com/2011/12/16/opinion/politics-over-principle.html>.

325. Charlie Savage, *Obama Drops Veto Threat Over Military Authorization Bill After Revisions*, N.Y. TIMES, Dec. 15, 2011, at A30.

326. See Press Release, The White House, Statement by the President on H.R. 1540 (Dec. 31, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

327. MC Form 458 (Charge Sheet), Ibrahim Ahmed Mahmoud al Qosi (Feb. 8, 2008), <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

328. See PE1 (Stipulation of Fact), Ibrahim Ahmed Mahmoud al Qosi (July, 2010), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

commission sentenced al Qosi to 14 years confinement but, pursuant to the plea agreement, the Convening Authority ordered that al Qosi's punishment beyond two years from July 7, 2010 be suspended.<sup>329</sup>

Omar Ahmed Khadr, a former Canadian child soldier, was once one of the youngest detainees held at Guantánamo Bay. On July 7, 2002, the then-fifteen-year-old threw a grenade during a firefight that killed Sergeant First Class Christopher Speer.<sup>330</sup> A military panel sentenced Khadr to 40 years confinement. Pursuant to a guilty plea, his confinement was capped at eight years and Khadr was allowed to transfer to Canada to serve the remainder of his sentence.<sup>331</sup>

Noor Uthman Muhammed, a Sudanese citizen was the third detainee to plead guilty under the 2009 MCA. The government charged Noor with conspiracy and MST for serving as a deputy commander of a terrorist training camp in Afghanistan.<sup>332</sup> A military panel sentenced Noor to 14 years confinement but pursuant to a guilty plea, his sentence was capped at 34 months.<sup>333</sup>

In what was an uncommon victory for the Office of Military Commissions, on February 29, 2012, Majid Shoukat Khan pleaded guilty to conspiracy, MST, espionage, murder, and attempted murder in violation of the laws of war.<sup>334</sup> In 1996, at the age of sixteen, Khan and his family emigrated to the United States from Pakistan and ultimately received asylum in the Baltimore area where Khan graduated from high school.<sup>335</sup> In 2002 Khan returned to his native Pakistan where he admitted to providing MST in the bombing of the J.W. Marriot hotel in Indonesia, which killed eight

329. Final Action, Ibrahim Ahmed Mahmoud al Qosi (Feb. 3, 2011), <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

330. See PE001-A (Stipulation of Fact), Omar Ahmed Khadr, ¶¶ 35-42 (Oct. 13, 2010), <http://www.mc.mil/CASES/MilitaryCommissions.aspx>

331. See, e.g., *Warped Justice*, N.Y. TIMES, Nov. 9, 2010, at A34.

332. MC Form 458 (Charge Sheet), Noor Uthman Muhammed (December 12, 2008), <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

333. See Cheryl Pellerin, *Military Commission Panel Sentences Guantánamo Detainee*, AMERICAN FORCES PRESS SERV., Feb. 18, 2011, <http://www.defense.gov/news/newsarticle.aspx?id=62876>.

334. See, e.g., Charles Stimson, *Majid Khan: Anatomy of a Terrorist's Plea Bargain*, HERITAGE FOUND., (Mar. 1, 2012), <http://www.heritage.org/research/reports/2012/03/guantanamo-detainee-majid-khan-anatomy-of-a-terrorist-plea-bargain>.

335. See, e.g., Charlie Savage, *'High Value' Detainee Is Said To Reach Tentative Plea Deal*, N.Y. TIMES, Feb. 23, 2012, at A17.

people in the summer of 2003, and conspiring with Khalid Sheikh Mohamed in an assassination attempt of former Pakistani President Perez Musharraf.<sup>336</sup> Following his capture in 2003, Khan was held at secret CIA foreign prisons before being transferred to Guantánamo Bay in 2006.<sup>337</sup>

Khan's unconventional pretrial agreement capped his sentence at 25 years but promised to further reduce his confinement to 19 years provided that he "provides full and truthful cooperation and substantial assistance," to the U.S. Government.<sup>338</sup> Such assistance will most certainly include testimony against KSM, among others, when the September 11th mastermind is finally brought to trial before military commission. Khan's sentencing will be delayed for four years, so as to provide Khan time to make good on his promise to cooperate. Analysts have heralded the Khan guilty plea as a "turning point" in the war on terror.<sup>339</sup> Not only does Khan's intimate experience with al Qaeda make him "uniquely valuable" to the government, but testimony by Khan will allow federal prosecutors to avoid using evidence tainted through coercion, heretofore a major stumbling block in federal courts.<sup>340</sup>

As of this writing, the case against Abd al-Rahim Hussein Muhammed Abdu al-Nashiri is ongoing with trial set to begin in the spring of 2012. Al-Nashiri is a Saudi citizen alleged to have masterminded the U.S.S. Cole bombing, which killed seventeen sailors, and is alleged to have headed al Qaeda operations in the Persian Gulf prior to his capture in November 2002.<sup>341</sup> Al-Nashiri is

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336. MC Form 458 (Charge Sheet), Majid Shoukat Khan (Feb. 13, 2012), *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

337. Eric Rich, *Terrorism Suspect Alleges "Mental Torture"*, WASH. POST, May 16, 2007, at A02.

338. AE013, Appendix A to Offer for Pretrial Agreement, U.S. v. Majid Shoukat Khan (Feb. 13, 2012), at ¶ 2, *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx>; Stimson, *supra* note 334.

339. *See, e.g.*, Matthew Hay Brown, *Turning Point Seen in Terror Prosecutions*, BALT. SUN, Fed. 29, 2012, at 1A; Stimson, *supra* note 334 ("The historic plea, which the military judge accepted, is a significant milestone in the war against terrorism and likely foreshadows cases to come.").

340. Brown, *supra* note 339, at 1A (quoting Karen Greenberg, director of the Center on National Security at Fordham law school as explaining the "clean" evidence Khan can provide "takes away what has haunted these cases from the beginning.").

341. RAPHAEL PERL & RONALD O'ROURKE, CONG. RESEARCH SERV., RS20721, TERRORIST ATTACK ON USS COLE: BACKGROUND AND ISSUES FOR CONGRESS 2 (2001).



charged with, *inter alia*, perfidy, murder in violation of the law of war, conspiracy, and terrorism.<sup>342</sup> The Government did not charge al-Nashiri with MST. In an effort at greater transparency, BG Martins chose the widely lauded act of televising al-Nashiri's arraignment. A closed-circuit television feed broadcasted the arraignment and *voir dire* from Guantánamo to a U.S. Army installation at Fort Meade, Maryland.<sup>343</sup> According to a participant who attended the arraignment, "attendance was surprisingly high at the Ft. Meade base theater."<sup>344</sup>

In remarks made to National Public Radio, BG Martins underscored that after two acts of Congress, a Supreme Court decision, and an executive review, the military commissions system is at long last a fair and transparent form of justice.<sup>345</sup> "Reasonable people looking at this system will see that it really will withstand scrutiny," he said.<sup>346</sup> Undeniably, BG Martins is correct. Why then the Government would choose to compromise the integrity of the system and risk hard-won victories with the questionable charge of providing MST is befuddling indeed. It is to that subject that this article now turns.

### III. A Self-Inflicted Wound: The Charge of Providing Material Support for Terrorism

While the attacks of 9/11 ushered in a paradigmatic shift, casting a reluctant<sup>347</sup> military in the lead role in counterterrorism, an

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342. See MC Form 458 (Referred Charge Sheet), Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (Sept. 15, 2011), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

343. Dina Temple-Raston, *Guantánamo Trial Opens with a Series of Firsts*, NAT'L PUB. RADIO, Nov. 9, 2011, <http://www.npr.org/2011/11/09/142159649/guantanamo-trial-opens-with-a-series-of-firsts>.

344. Keith Gerver, *Al-Nashiri Arraignment Coverage: Voir Dire and Arraignment*, LAWFARE (Jan 7, 2012, 11:29 AM), <http://www.lawfareblog.com/2012/01/justice-and-the-enemy-nuremberg-911-and-the-trial-of-khalid-sheik-mohammed/>.

345. See, e.g., Johnson, Yale Speech, *supra* note 35 ("We are working to make the system a more transparent one, by reforming the rules for press access to military commissions proceedings, establishing close circuit TV, and a new public website for the commissions system.").

346. Temple-Raston, *supra* note 343 (quoting Brigadier General Mark Martins, Chief Prosecutor, Military Commissions).

347. In his presidential memoirs President Bush expresses exasperation with the military's pain-staking approach to military commissions, writing:

emasculated law enforcement underwent its own transformation. This shift is best described as a focus on prevention rather than reaction.<sup>348</sup> Essential to this preventive strategy are the material support provisions codified at 18 U.S.C. § 2339A and § 2339B.<sup>349</sup> Apart from the sheer efficacy these statutes play in circumventing attacks, the provisions are important in two other respects. First, their widespread use can be viewed as the consistent application of the Bush Doctrine to “make no distinction between the terrorists who committed these acts and those who harbor them.” Second, the material support provisions have greatly exacerbated the delicate tension between civil liberties and national security.<sup>350</sup> In its

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It had taken two and a half years for the Defense Department to work out the procedures and start the first trial. No doubt it was a complex legal and logistical undertaking. But I detected a certain lack of enthusiasm for the project. With all the pressures in Iraq and Afghanistan, it never seemed like the tribunals were a top priority.

BUSH, *supra* note 40, at 178.

348. *Aiding Terrorists Hearing*, *supra* note 30, at 163 (statement of Paul Rosenweig, Senior Legal Research Fellow at the Heritage Foundation) (“Equally important, it is policing of a different form – preventative rather than reactive, since there is less value in punishing terrorists after the fact when, in some instances, they are willing to perish in the attack.”). See also *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705, 2728 (2010) (“The material-support statute is, on its face, a preventive measure – it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur.”).

349. On May 5, 2004, the Assistance Attorney General, Criminal Division testified:

Our offensive strategy targets both the perpetrators of violence and those who give them material support. The chronology of a terrorist plot is a continuum from idea, to planning, to preparation, to execution and attack. The material support statutes help us strike earlier on that continuum – we would much rather catch terrorists with their hands on a check than on a bomb.

*Aiding Terrorists Hearing*, *supra* note 30, at 177 (statement of Christopher A. Wray, Assistant Attorney General, Criminal Division).

350. As Mr. Rosenzweig explained before the Senate Judiciary Committee:

The traditional law enforcement model is highly protective of civil liberty in preference to physical security. . . . The post-September 11 world changes this calculus in two ways. First, and most obviously, it changes the cost of the Type II errors [described as false negatives]. Whatever the cost of freeing John Gotti or John Mohammed might be, they are substantially less than [sic] the potentially horrific costs of failing to stop the next al-Qaeda assault. Thus, the theoretical rights-protective construct under which our law enforcement system operates must, of necessity, be modified to meet the new reality. We simply cannot afford a rule that “better 10 terrorists go undetected than that the conduct of 1 innocent be mistakenly examined.”

laudable effort at keeping the country safe, the Bush Administration was willing to recalibrate that balance through the use of the provisions.<sup>351</sup>

This Part consists of three sub-sections. Subpart A considers the origins and scope of the material support statutes. Subsection B considers the seminal case of *Holder v. Humanitarian Law Project (HLP)* – a critical development in the application of 18 U.S.C. § 2339B. Sub-section C concludes the article by analyzing the CMCR's recent holdings that MST constitutes a war crime, thereby bringing violations within the subject matter jurisdiction of military commissions.

### *A. Origins of the Material Support Provisions: A Tale of Two Statutes*

#### *1. A Long and Winding Road*

The roots of the current material support provisions, codified at 18 U.S.C. §§ 2339A and 2339B, can be traced back to the early years of the Reagan administration. On December 14, 1981, Rep. Matthew J. Rinaldo (R-N.J.) introduced H.R. 5211, a bill that sought to criminalize military or intelligence assistance to terrorists or terrorist organizations designated by the President.<sup>352</sup> According to Rinaldo, he was “amazed to read accounts of Americans providing vital weapons and logistics support and services to Colonel Qadhafi” of Libya.<sup>353</sup> Rinaldo further explained he introduced the bill following the bombshell that a CIA agent, Edwin Wilson, had provided the Libyan dictator with weapons, logistics support, and assisted in the construction of a laboratory that could be used for development of nuclear weapons.<sup>354</sup> As Professor Robert M. Chesney has explained,

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*Id.* at 163-64.

351. See, e.g., Michael Chertoff, *Law, Loyalty, and Terror*, WEEKLY STANDARD, Dec. 1, 2003, at 15, 17. Michael Chertoff, the second Secretary of Homeland Security under President Bush and coauthor of the USA PATRIOT Act has written: “[t]hat balance [between civil liberties and national security] was struck in the first flush of the emergency. If history shows us anything, however, it shows that we must be prepared to review and if necessary recalibrate that balance.”

352. The Anti Terrorism and Foreign Mercenary Act, H.R. 5211, 97th Cong. (1981).

353. *The Anti Terrorism and Foreign Mercenary Act: Hearing Before the Sen. Comm. on the Judiciary*, 97th Cong. 2 (1982) (statement of Rep. Matthew J. Rinaldo, Rep. New Jersey).

354. *Id.* See also Peter Carlson, *International Man of Mystery*, WASH. POST, June 22,

H.R. 5211 was “[t]he first proposal to criminalize the provision of assistance to terrorists or terrorist organizations.”<sup>355</sup> Although H.R. 5211 died in committee, the idea of criminalizing support to international terrorists would live on.

In 1984, Representative Dante Fascell (D-Fla) introduced H.R. 5613, a bill that sought to prohibit U.S. citizens and businesses from training or supporting international terrorist organizations.<sup>356</sup> The bill met intense criticism, to include allegations that it violated the First Amendment, and died in committee as well.<sup>357</sup>

The term “material support” first appeared in federal legislation in the 1990 Immigration and Nationality Act (INA).<sup>358</sup> Sponsored by Senator Edward M. Kennedy (D-MA), the INA<sup>359</sup> was a far-reaching reform of U.S. immigration laws.<sup>360</sup> While domestic law already excluded aliens from the United States who “engage in terrorist activity,” the INA expanded the scope of this phrase. Under the INA, it was now permissible to exclude an alien from the United States if that individual had committed an act of providing material support to a terrorist organization or a member of such an organization.<sup>361</sup> While significant, this milestone in the development of the material support provisions merely precluded

2004, at C01.

355. *Aiding Terrorists Hearing*, *supra* note 30, at 128 (statement of Professor Robert M. Chesney).

356. Prohibition Against the Training or Support of Terrorist Organizations Act of 1984, H.R. 5613, 98th Cong. (1984).

357. See, e.g., *Prohibition Against the Training or Support of Terrorist Organizations Act of 1984, Hearing Before the H. Comm. on the Judiciary*, 98th Cong. 3 (1984) (statement of Joseph M. Hassett and Jerry J. Berman, American Civil Liberties Union) (“H.R. 5613 is clearly unconstitutional. It violates the fundamental principle of our constitutional law that a ‘blanket prohibition of association with a group having both legal and illegal aims. . . .’”).

358. See, e.g., Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. NAT’L SECURITY L. & POL’Y 297, 316 (2008).

359. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter INA].

360. See, e.g., The American Presidency Project, George Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#axzz1jYtQfMGX> (quoting President George H.W. Bush as heralding the legislation as “the most comprehensive reform of our immigration law in 66 years.”).

361. INA, *supra* note 359, § 212(a)(3)(B)(iv). See also MICHAEL JOHN GARCIA & RUTH ELLEN WASEN, CONG. RESEARCH SERV., RL32564, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS 7 (2010); *Aiding Terrorists Hearing*, *supra* note 30, at 129 (statement of Professor Robert M. Chesney).

aliens from gaining admission to the United States rather than criminalizing the support activities of American citizens. That development would be spurred on by the first attack against the United States by al Qaeda.

Following the bombing of the World Trade Center in 1992 Congress passed the Violent Crime Control and Law Enforcement Act.<sup>362</sup> The act included what is now section 2339A, a prohibition on "providing material support to terrorists." Specifically, section 2339A makes it a crime to provide "material support or resources" to any recipient when the donor knew or intended that the support was to be used "in preparation for, or in carrying out a violation of" any one of several crimes specified in the statute.<sup>363</sup> As such, section 2339A includes a specific intent element.<sup>364</sup> As originally enacted, material support included a plethora of items and services and was defined in reference to the following items and services:

Currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, but does not include humanitarian assistance to persons not directly involved in such violations.<sup>365</sup>

Critics argued section 2339A did not go far enough in prohibiting support to terrorists. Specifically, they pointed to the provision's specific intent standard as creating a pernicious loophole that would-be supporters could exploit. So long as a donor believed her aid was being used for a lawful purpose the law did nothing to preclude that support.<sup>366</sup> Consequently, as Professor Chesney explains, "[a] person could donate thousands of dollars to Hamas or Hezbollah, for examples, so long as he or she thought the money might be spent on the political or social services those groups

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362. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) [hereinafter VCCA].

363. *Id.* § 12005(b).

364. David Henrik Pendle, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt*, 30 SEATTLE U. L. REV. 777, 784 ("But § 2339A did not foreclose the possibility of donors supporting criminals: a donor would not be liable for supporting a criminal so long as he or she did not know or specifically intend the aid to do so.").

365. VCCA, *supra* note 362, § 12005(a). This definition has been expanded by Congress. See also *infra* note 375.

366. See, e.g., Pendle, *supra* note 364, at 783.

provided.”<sup>367</sup>

Congress would address this loophole through enactment of 18 U.S.C. § 2339B. As was the case with section 2339A, however, it would take another terrorist attack on American soil to provide the final impetus. On April, 19 1995, in what remains the worst act of domestic terrorism on U.S. soil, Timothy McVeigh detonated an explosive-filled Ryder truck in front of the Alfred P. Murrah Federal Building in downtown Oklahoma City.<sup>368</sup> In response to the attack, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA).<sup>369</sup>

Section 303 of the AEDPA created a wholly new material support offense in 18 U.S.C. § 2339B. Critical to the breadth of the material support provision was a finding by Congress that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>370</sup> Section 219 of the AEDPA created the corresponding foreign terrorist designation system codified at 8 U.S.C. 1189.<sup>371</sup> As one practitioner has written, “[a]s the first major anti-terrorism legislation after a large-scale domestic terrorist attack in the United States, [§ 2339B] represented an unprecedented broadening of U.S. anti-terror laws.”<sup>372</sup>

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367. Chesney, *supra* note 38, at 13.

368. See, e.g., David Johnston, *Terror In Oklahoma: The Overview: Oklahoma Bombing Plotted for Months*, *Officials Say*, N.Y. TIMES, Apr. 25, 1995, at A1.

369. Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-21, 110 Stat. 1214 (1996).

370. *Id.* § 301(a)(7).

371. *Aiding Terrorists Hearing*, *supra* note 30, at 150 (statement of William E. Moschella, Assistant Attorney General) (noting that “[a]lthough 2339B was enacted in April 1996, it did not become operational until the Secretary of State designated the first set of 30 Foreign Terrorist Organizations (FTOs) on October 7, 1997.”). Al Qaeda was not designated an FTO until October 8, 1997. See U.S. Dep’t of State, Foreign Terrorist Organizations, Oct. 8, 1999, [http://www.state.gov/www/global/terrorism/fto\\_1999.html#fto](http://www.state.gov/www/global/terrorism/fto_1999.html#fto) (stating that “Al-Qaida, led by Usama bin Ladin, was added because it is responsible for several major terrorist attacks, including the August 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar Es Salaam, Tanzania.”).

372. Peterson, *supra* note 358, at 321.

## 2. The "Watershed Legislative Development of Terrorist Financing Enforcement"<sup>373</sup>

Under 18 U.S.C. § 2339B, once the Secretary of State designates an organization as a foreign terrorist organization (FTO) and publishes that designation in the Federal Register, it becomes a crime to "knowingly provide[] material support or resources to a foreign terrorist organization, or [to] attempt[] or conspire[] to do so."<sup>374</sup> Unlike the specific intent mens rea requirement of section 2339A, the donor only needs to know the organization was designated an FTO when she attempted to provide something falling within the broad ambit of material support, as defined in 18 U.S.C. § 2339A(b)(1).<sup>375</sup> A showing that the donor intended to

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373. *A Review of the Tools to Fight Terrorism, Hearing of the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Judiciary Comm.*, 108th Cong. 9 (2004) (statement of Barry Sabin, Chief, Counterterrorism Section, Justice Department, Criminal Division).

374. 18 U.S.C. § 2339B(a) (2011).

375. 18 U.S.C. § 2339B(g)(4) states that material support is the same definition used in 18 U.S.C. § 2339A(b)(1), although Congress has repeatedly expanded the definition. Shortly after the 9/11 attacks, the USA PATRIOT Act added "expert advice and assistance" to the statutory list of prohibited items and services. See PATRIOT Act, *supra* note 59, § 805(A)(2)(B). Additionally, the PATRIOT Act increased the potential prison term from 10 to 15 years and if death occurs from a violation of the statute, an individual may be sentenced to life in prison. *Id.* § 810(d)(1-2). In 2004, through the Intelligence Reform and Terrorism Prevention Act (IRTPA), Congress revised 2339B(a)(1) to unequivocally indicate the mens rea requirement. The amendment reads as follows: "[t]o violate this subsection, a person must have knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism." See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6602(a), 118 Stat. 3638 (2004) (internal citations omitted). This amendment unambiguously eschewed a specific intent standard in favor of a more permissive knowledge standard, thereby precluding any U.S. citizen from providing any assistance to any FTO, regardless of the donor's intent or the FTO's lawful purposes. As Professors James Dempsey and David Cole have written, "[i]f this law had been on the books in the 1980s, it would have been a crime to give money to the African National Congress during Nelson Mandela's speaking tours here, for the state Department routinely listed the ANC as a 'terrorist group.'" JAMES X. DEMPSEY & DAVID COLE, *TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 318 (1999).

IRTPA additionally provided definitions for the terms "training" and "expert advice or assistance." *Id.* § 6603(b)(2-3). As amended by IRTPA, the definition of material support, as currently codified in 18 U.S.C. § 2339A(b)(1) reads as follows:

[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or

further an illegal activity is not required, thereby closing the loophole presented by 18 U.S.C. § 2339A.<sup>376</sup> The DOJ's Office of Legal Education has referred to section 2339B as "the closest thing American prosecutors have to the crime of being a terrorist."<sup>377</sup>

*a. The Designation Process: "Terrorism Is Whatever the Secretary of State Decides It Is"*<sup>378</sup>

As indicated, designation of an organization as an FTO is the trigger for a section 2339B violation. A brief consideration of the process is therefore warranted. The process begins in the State Department's Office of the Coordinator for Counterterrorism (S/CT), which is responsible for "continually monitor[ing] the activities of terrorist groups active around the world to identify potential targets for designation."<sup>379</sup> Once S/CT identifies a possible FTO, it compiles an administrative record, consisting of both classified and open source information.<sup>380</sup> Per 18 U.S.C. § 1189(d)(4), the Secretary of State, in consultation with the Attorney General and Secretary of the Treasury, may then designate the organization an FTO based upon the administrative record provided that she determines the following:

(A) the organization is a foreign organization; (B) the organization engages in terrorist activity or retains the capability and intent to engage in terrorist activity or terrorism . . . ; and (C) the terrorist activity or terrorism of the organization threatens the security of

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assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

*Id.* § 6603(b)(1).

376. See, e.g., *Aiding Terrorists Hearing*, *supra* note 30, at 139 (statement of Professor David Cole). See also Katherine R. Zerwas, *No Strict Scrutiny - The Court's Deferential Position on Material Support to Terrorism in Holder v. Humanitarian Law Project*, 37 WM. MITCHELL L. REV. 5337, 5339-40 (2011).

377. JEFFREY A. BREINHOLT, DEP'T OF JUSTICE, OFFICE OF LEGAL EDUC., COUNTERTERRORISM ENFORCEMENT: A LAWYER'S GUIDE 264 (2004).

378. DEMPSEY & COLE, *supra* note 375, at 119.

379. See U.S. Dep't of State, Foreign Terrorist Organizations (Jan. 27, 2012), <http://www.state.gov/g/ct/rls/other/des/123085.htm> [hereinafter *State/FTOs*] (explaining that "[w]hen reviewing possible targets, S/CT looks not only at the actual terrorist attacks that a group has carried out, but also at whether the group has engaged in planning and preparations for possible future acts of terrorism or retains the capability and intent to carry out such acts.").

380. *Id.*



United States nationals or the national security of the United States.<sup>381</sup>

Seven days prior to making a designation, the Secretary of State notifies select members of Congress.<sup>382</sup> Congress then has seven days to review the proposed designation.<sup>383</sup> At the end of this seven day period, assuming Congress does not disapprove the designation, notice appears in the Federal Register.<sup>384</sup> No notice to the FTO is required. A designation under the act continues for two years, unless revoked by the Secretary or Congress based upon a "change in circumstances."<sup>385</sup> There is no limit to the number of redesignations the Secretary may authorize.

An FTO may seek judicial review of the designation, within thirty days of publication in the Federal Register, in the United States Court of Appeals for the District of Columbia Circuit.<sup>386</sup> The terms of judicial review are, however, largely stacked in the government's favor. The court is limited to reviewing the administrative record as well as any classified information submitted on behalf of the government but the FTO is not allowed to submit any information.<sup>387</sup> Moreover, classified information is not disclosed to the FTO but reviewed by the court *ex parte* and *in camera*.<sup>388</sup> The court may only "hold unlawful and set aside" a designation that it finds to be:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or (E) not in accord with the procedures required by law.<sup>389</sup>

Not surprisingly, few FTOs have challenged their designations

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381. 18 U.S.C. § 1189(a)(1) (2011).

382. *Id.* § 1189(a)(2)(A)(i).

383. *Id.*

384. *Id.* § 1189(a)(2)(A)(ii).

385. *Id.* § 1189(a)(6)(A)(i).

386. *Id.* § 1189(c)(1).

387. *Id.* § 1189(a)(3)(B).

388. *Id.*

389. *Id.* § 1189(c)(3).

in court and those that have were unsuccessful in having a designation overturned.<sup>390</sup> Even when the court has found a procedural due process violation, deference to the Secretary's designation has precluded meaningful relief to the FTO. *People's Mojahedin Organization of Iran* (PMOI) is illustrative.

In 1999, in what was the first challenge to the process, two designated FTOs (PMOI and the Liberation Tigers of Tamil Eelam) sought judicial review claiming the designation scheme violated due process, particularly as the designation made it a crime to donate money to both groups.<sup>391</sup> The court held for the government, claiming that "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."<sup>392</sup> As neither group possessed such presence or property at the time of their designation, they were not entitled to due process. This, however, was not the end to the litigation.

Two years later, the Secretary of State designated the National Council of Resistance of Iran (NCRI) an FTO as it was "an alter ego or alias of the PMOI."<sup>393</sup> The NCRI claimed a due process violation and sought judicial review. Unlike the PMOI, the government acknowledged that the NCRI had an office in the National Press Building in Washington, D.C., and a bank account in the United States.<sup>394</sup> Relying on the precedent set in *PMOI*, the court held that the NCRI was therefore entitled to notice and a hearing.<sup>395</sup> While the court clearly found a violation of due process,<sup>396</sup> rather than reverse the designation, it remanded it to the Secretary of State to take remedial action.<sup>397</sup>

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390. See, e.g., Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L. J. 543, 560 (2011); Randolph N. Jonakait, *Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125, 130 (2004).

391. *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F. 3d 17, 22 (D.C. Cir. 1999).

392. *Id.*

393. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F. 3d 192, 197 (D.C. Cir. 2001).

394. *Id.* at 201.

395. *Id.* at 209.

396. *Id.* at 200 ("The United States's defense against the constitutional claims of the petitioners is two-fold: (1) that the petitioners have no protected constitutional rights and (2) that even if they have such rights, none are violated. Both lines of defense fail.").

397. *Id.* at 209.

Two years later and for a third time, the Secretary designated the organization an FTO. In accordance with the court's ruling, the Secretary provided the organization notice and a hearing. In what was its third petition to the D.C. Court of Appeals, the organization advanced the "colorable argument" that the Secretary's use of classified information in making the designation violated the PMOI's right to due process.<sup>398</sup> The court, however, ultimately dismissed the claim, noting that "[t]he Due Process Clause requires only that process which is due under the circumstances of the case" and the Secretary had provided the PMOI an opportunity to respond to the *unclassified* material.<sup>399</sup> As such, there was no due process violation.

The actions of the U.S. Court of Appeals for the District of Columbia Circuit in the NCRI/PMOI litigation has led some critics to claim the deference the court will naturally afford the Secretary's determination in the area of national security "effectively gives the Secretary of State a blank check to blacklist disfavored groups."<sup>400</sup> Other criticisms can be identified as well, which are the subjects of the next two sections.

*b. Is Immaterial Material?*

A second criticism leveled at section 2339B is it is overbroad as it criminalizes innocuous behavior absent proof of specific intent to further illegal activities.<sup>401</sup> DOJ's Office of Legal Education has used the term "strategic overinclusiveness" in describing terrorist financing enforcement.<sup>402</sup> Regardless of the term used, section 2339B appears to criminalize seemingly nonthreatening support, evident in the following colloquy between Justice Sotomayor and Solicitor General Kagan during oral arguments in *Holder v.*

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398. *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F. 3d 1238, 1242 (D.C. Cir. 2003) ("Granted, petitioners argue that their opportunity to be heard was not meaningful, given that the Secretary relied on secret information to which they were not afforded access.").

399. *Id.* (holding that "[w]e already decided in *NCOR* that due process required the disclosure of *only* the unclassified portions of the administrative record.").

400. DEMPSEY & COLE, *supra* note 375, at 119.

401. See, e.g., *Aiding Terrorists*, *supra* note 30, at 142 (statement of Professor David Cole).

402. JEFFREY A. BREINHOLT, DEP'T OF JUSTICE, OFFICE OF LEGAL EDUC., *TERRORIST FINANCING* 7 (2003), [http://justice.gov/usao/eousa/foia\\_reading\\_room/usab5104.pdf](http://justice.gov/usao/eousa/foia_reading_room/usab5104.pdf).

*Humanitarian Law Project:*

JUSTICE SOTOMAYOR: Under the definition of this statute, teaching these members to play the harmonica would be unlawful. You are teaching – training them in a lawful – in a specialized activity. So how do we – there has to be something more than merely a congressional finding that any training is bad.

GENERAL KAGAN: Well, I think here we have the congressional definition of what kind of training is bad, and that definition focuses on training in specialized activities. Now, you say, well, maybe training a – playing harmonica is a specialized activity. I think the first thing I would say is there are not a whole lot of people going around trying to teach Al-Qaeda how to play harmonicas.<sup>403</sup>

As Justice Sotomayor observes, while both 18 U.S.C. §§ 2339A and 2339B include the same definition of material support, it is limited to delineating what activities constitute “material support” by reference, without explaining why. *Webster's* defines “material” as “having real importance or great consequences.”<sup>404</sup> Reference to other statutes employing “material” yields a similar result. In 1988, for example, the Supreme Court considered what constitutes a “material representation” for immigration purposes. Writing for the majority, Justice Scalia held that “the test of whether . . . misrepresentations are ‘material’ is whether they can be shown . . . to have been predictably capable of affecting, i.e., to have had a natural tendency to affect, the Immigration and Naturalization Service’s decisions.”<sup>405</sup>

Consequently, support that is “material” should denote a substantial assistance to terrorist activity. In other words, there should be a discernible nexus between the contribution and a terrorist act. This is often not the case, however. As a federal judge in Miami wrote in 2005, “a cab driver could be guilty for giving a ride to an FTO member to the UN, if he knows that the person is a member of an FTO.”<sup>406</sup> Similarly, Professor David Cole has written, “[u]nder this law it would be crime for a Quaker to send a book on

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403. Transcript of Oral Argument at 49, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498).

404. Merriam Webster Online Dictionary (2012), <http://www.merriam-webster.com/dictionary/material>.

405. *Kungys v. United States*, 485 U.S. 759, 760 (1988).

406. *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1337 (2005).

Ghandi's theory of nonviolence . . . to the leader of a terrorist organization in hopes of persuading him to forgo violence."<sup>407</sup>

The Board of Immigration Appeals at DOJ considered the degree of materiality for support to be material in a 2006 immigration case. Although an immigration judge found that S-K, a citizen of Burma and an ethnic Chin, had a well-founded fear of prosecution were she to be returned to Burma, the board of appeals upheld the judge's denial of her application for asylum.<sup>408</sup> S-K had provided material support to the Chin National Front (CNF), "an organization which uses land mines and engages in armed conflict with the Burmese Government."<sup>409</sup>

S-K argued that her contribution to the CNF, consisting of a pair of binoculars and a small donation of cash, was not material and went "against congressional intent to tie materiality to terrorist activity."<sup>410</sup> Sustaining S-K's denial of asylum, the board cited a Third Circuit case holding that "the provision of very modest amounts of food and shelter to individuals who the alien reasonably should have known had committed or planned to commit terrorist activity did constitute material support."<sup>411</sup> The board further cited an assertion made by the Department of Homeland Security in light of the Third Circuit's decision that "the term 'material' support is effectively a term of art and that all the listed types of assistance are covered, irrespective of any showing that they are independently 'material.'"<sup>412</sup>

The precedent established above has far-reaching consequences. While there is no denying the effectiveness of section 2339B,<sup>413</sup> the statute has shifted criminalizing behavior away from

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407. Cole, *supra* note 30, at 10. In Professor Cole's example there is no appreciable nexus between the support (providing a book on nonviolence) and any terrorist activity, and yet, under 2339B and the *Holder v. HLP* holding (considered in section IIIB), the Quaker would be guilty of violating the material support statute.

408. Matter of S-K, 23 I. & N. Dec. 936, 937, 946 (BIA 2006).

409. *Id.* at 937.

410. *Id.* at 942.

411. *Id.* at 944 (citing *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 299 (3d Cir. 2004)).

412. *Id.* at 945.

413. See, e.g., BREINHOLT, *supra* note 377, at 264 (noting that the material support provision statutes are critical to "one of the most important law enforcement response to 9/11."). See also *Aiding Terrorists Hearing*, *supra* note 30, at 8 (statement of William Daniel J. Bryant, Assistant Attorney General, Office of Legal Policy, DOJ) ("[T]he material support statutes are an invaluable tool for prosecutors seeking to bring charges against and incapacitate terrorists before they are able to cause

actual violence perpetrated by terrorists towards seemingly innocent conduct, implicating both First and Fifth Amendment concerns along the way. It is those concerns this article now considers.

*c. Expressive Association and Personal Guilt*

Although the Supreme Court considered section 2339B's constitutional implications at length in *Holder v. HLP*, it is worthwhile here to briefly sketch the arguments. Critics maintain that because section 2339B criminalizes conduct based upon support of a disfavored group, rather than the actor's intentions, it imposes guilt by association and violates the First and Fifth Amendments.<sup>414</sup> Congress appeared to be mindful of possible constitutional complications when it wrote the statute. The law specifically provides that "[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States."<sup>415</sup>

At the height of the Cold War the Supreme Court held that "[i]n our jurisprudence guilt is personal."<sup>416</sup> That case considered the conviction of Junius Scales. Scales was a regional chairman of the U.S. Communist Party.<sup>417</sup> A district court had found him guilty of violating the membership clause of the Smith Act, making it a crime to be a member of any organization advocating the overthrow of the government by force or violence.<sup>418</sup> The Fourth Circuit affirmed Scales's conviction and the Supreme Court granted certiorari.

Scales asserted violations of the First Amendment (the Act "infringe[d] on free political expression and association") and the

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death and destruction."); Jonakait, *supra* note 390, at 125 ("The criminalizing status, Section 2339B, creates a major prosecutorial tool in the fight against terrorism."); Chesney, *supra* note 38, at 20 ("Prosecutors have made extensive use of the terrorism-support laws since 9/11."); Cole, *supra* note 30, at 9 ("Virtually every criminal 'terrorism' case that the government has filed since September 11 has included a charge that the defendant provided material support to a terrorist organization.").

414. See, e.g., *Aiding Terrorists Hearing*, *supra* note 30, at 142 (statement of Professor David Cole). See also Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT'L L. REV. 519, 522 (2011).

415. 18 U.S.C. § 2339B(i) (2011).

416. *Scales v. United States*, 367 U.S. 203, 224 (1961).

417. *Id.* at 244.

418. The Smith Act, 18 U.S.C. § 2385 (1956).

Fifth Amendment ("it impermissibly imputes guilt to an individual merely on the basis of his associations and sympathies").<sup>419</sup> Although the Court affirmed Scales's conviction by 5-4, it introduced the contemporary constitutional test for criminalizing association.

For Justice Harlan, the author of the majority opinion, the test begins by assessing an individual's relationship to the organization's criminal activity.<sup>420</sup> When that relationship can be characterized as "nominal, passive, inactive, or purely technical member[ship]," personal guilt must be proven to convict the individual on the basis of the relationship.<sup>421</sup> On the other hand, if the individual was an active member "with knowledge of the Party's illegal advocacy and a specific intent to bring about" its unlawful ends, personal guilt is not required for a conviction.<sup>422</sup> The Court explained:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship.<sup>423</sup>

With respect to Scales's First Amendment claim, the Court held that as he was an active member of the Communist Party and had the specific intent to violently overthrow the government "as speedily as circumstances would permit,"<sup>424</sup> his speech was not protected.<sup>425</sup> Nevertheless, the Court held that the First Amendment circumscribes the government from imposing liability solely on the basis of an individual's associations. The Court explained, "[i]f there were a similar blanket prohibition of association with a group

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419. *Scales*, 367 U.S. at 220.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 224-25.

424. *Id.* at 220.

425. *Id.* at 228.

having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired.”<sup>426</sup>

*Scales* therefore stands for the proposition that in order to criminalize membership in an unpopular organization, the government must prove the accused was both an active member and the accused possessed the specific intent to bring about the organization’s illegal activities.<sup>427</sup> The Court has extended these principles to subsequent First<sup>428</sup> and Fifth<sup>429</sup> Amendment jurisprudence. *Holder v. HLP*, however, would prove an exception.

### ***B. Developments in the Material Support Provisions: Holder v. HLP***

*Holder v. HLP* is a seminal case in the development of MST with far-reaching consequences for the charge of MST at military commissions. After a series of detainee cases<sup>430</sup> in which the Court made clear that the executive’s “authority and expertise in these matters do[es] not automatically trump the Court’s own obligation,”<sup>431</sup> *Holder* marks a forceful return to a jurisprudence

426. *Id.* at 229.

427. *Id.* at 228-29.

428. *See, e.g., Shanor, supra* note 414, at 527 (noting the Court applied this reasoning eight years later in the seminal First Amendment case, *Brandenburg v. Ohio*). Citing *Scales*, the *Brandenburg* Court held that “an ‘active’ member who has a guilty knowledge and intent of the aim to overthrow the Government by violence may be prosecuted.” *Brandenburg v. Ohio*, 395 U.S. 444, 453-54 (1969) (internal citations omitted).

429. *See, e.g., Aiding Terrorists, supra* note 30, at 141 (statement of Professor David Cole) (“Recognizing that guilt by association is a philosophy ‘alien to the traditions of a free society and the First Amendment itself. . . .’” (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982))).

430. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the degree of control the United States exercised over Guantánamo Bay was adequate to trigger the application of habeas corpus rights); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that the Fifth Amendment guarantees a citizen held in the United States as an enemy combatant the right to contest that detention before a neutral decision maker); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding in part that the military commissions inaugurated by President Bush were invalid as the President failed to comply with the UCMJ); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that detainees at Guantánamo Bay had a right to habeas corpus under the Constitution and the 2006 MCA was an unconstitutional suspense of that right).

431. *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705, 2713 (2010) (Breyer, J., dissenting).



marked by great deference to executive and legislative judgments.<sup>432</sup>

The plaintiffs in *Holder* sought a declaratory judgment and injunction to prevent the enforcement of 18 U.S.C. § 2339B.<sup>433</sup> Plaintiffs sought to provide varied support, consisting of monetary contributions, humanitarian aid, legal training, and political advocacy, to two dual-structured<sup>434</sup> FTOs; the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Ealam (LTTE).<sup>435</sup> The plaintiffs claimed that section 2339B was impermissibly vague and violated the Due Process Clause of the Fifth Amendment. Additionally, plaintiffs claimed that the statute offended their freedoms of speech and association under the First Amendment.<sup>436</sup> Having found the case justiciable, as "[p]laintiffs face[d] 'a credible threat of prosecution,'" Chief Justice Roberts, writing for the majority, considered each alleged violation.

As a preliminary matter, the Court first considered whether to apply the doctrine of constitutional avoidance.<sup>437</sup> The plaintiffs had urged the Court to read a specific intent element into section 2339B. This would have terminated the litigation as none of the assistance they sought to provide to the PKK and the LTTE had the purpose of furthering either groups' terrorist activities.<sup>438</sup> Chief Justice Roberts declined to do so, as it would be "inconsistent with the text of the statute."<sup>439</sup> While the plaintiffs argued that the *Scales* precedent

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432. See, e.g., *The Supreme Court 2009 Term: Leading Cases*, 124 HARV. L. REV. 259, 267 (2010) (arguing that the Court's methodology "was consistent with approaches the Court has adopted in cases involving serious but amorphous national security threats" such as *Korematsu v. United States* and *Dennis v. United States*).

433. *Holder*, 130 S. Ct. at 2714.

434. A dual-structured FTO is an organization that has been designated by the Secretary of State in accordance with 18 U.S.C. § 1189, which also engages in lawful political and humanitarian activities.

435. The Secretary of State designated both groups as FTOs in 1997. See *Holder*, 130 S. Ct. at 2713. According to the State Department's Office of the Coordinator for Counterterrorism's most recent list of 49 FTOs, both groups continue to be designated as FTOs as of September 15, 2011. See *State/FTOs*, *supra* note 379.

436. *Holder*, 130 S. Ct. at 2716.

437. The doctrine holds that a federal court should rule on a constitutional issue only as a last resort. See, e.g., *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of.").

438. *Holder*, 130 S. Ct. at 2718.

439. *Id.* ("Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not

should apply,<sup>440</sup> the Court briefly dismissed that case as incongruent, writing that *Scales* only requires a specific intent mens rea where the statute prohibits membership in a group.<sup>441</sup>

In his dissent, joined by Justices Sotomayor and Ginsburg, Justice Breyer concluded that a construction avoiding the troublesome constitutional issues was “fairly possible.”<sup>442</sup> The dissent interpreted section 2339B so that “knowingly” described the words “material support.” That is, under the dissent’s construct, section 2339B would criminalize First Amendment protected speech only when the donor knew or intended that the support would further the FTO’s terrorist acts.<sup>443</sup> Although the Court’s perfunctory dismissal of *Scales* is questionable,<sup>444</sup> Chief Justice Roberts appears to have the better argument. Indeed, as noted above, one of the purposes in enacting section 2339B was to close the loophole presented by 2339A’s specific intent element.<sup>445</sup>

Having concluded that avoidance of the constitutional issues in this case would “pervert[] the purpose” of the statute, the Court readily dismissed plaintiffs’ Fifth Amendment challenge.<sup>446</sup> The Court concluded that the statutory terms provided by Congress – particularly in light of numerous revisions – “provide[d] a person of ordinary intelligence fair notice of what is prohibited.”<sup>447</sup> Indeed, the dissent agreed that section 2339B “is not unconstitutionally vague.”<sup>448</sup>

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specific intent to further the organization’s terrorist activities.”).

440. See *supra* note 427 and accompanying text.

441. *Holder*, 130 S. Ct. at 2718 (“This action is different: Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing ‘material support’ to such a group. Nothing about *Scales* suggests the need for a specific intent requirement in such a case.”) (internal citations omitted).

442. *Id.* at 2740 (Breyer, J., dissenting).

443. *Id.* (Breyer, J., dissenting).

444. See, e.g., Zerwas, *supra* note 376, at 5351 (“But, by limiting *Scales* to its facts, the HLP Court ignored the plain language of the *Scales* decision.”). See also Shanor, *supra* note 414, at 528 (“This holding is significant not only because the Court arguably sub silentio overruled the Communist Party precedents, but because in so doing it adopted a vision of the scope of the right of association that potentially collapses to all but a solitary speech act.”).

445. See *supra* note 367 and accompanying text.

446. *Holder*, 130 S. Ct. at 2718.

447. *Id.* at 2720 (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

448. *Id.* at 2731 (Breyer, J., dissenting).

The bulk of the opinion concerns the freedom of speech challenge. The analysis appeared to begin in the plaintiffs' favor. The Court rejected the government's argument that intermediate scrutiny should apply. Rather, the Court indicated it would apply strict scrutiny as the statute regulated the content of what the plaintiffs could say to the FTOs.<sup>449</sup> Despite Gerald Gunther's famous aphorism that strict scrutiny is "strict in theory and fatal in fact," *Holder* proved to be an exception.<sup>450</sup> The Court (as well as the dissent) had little difficulty determining the "Government's interest in combating terrorism" is compelling – satisfying the first part of the strict scrutiny test.<sup>451</sup>

The key question turned on whether section 2339B's means were narrowly tailored. The plaintiffs argued that their intent should be dispositive. If, as they argued, their sole purpose was to promote the FTOs' peaceful ends, the ban on material support would not be the least restrictive means to further that interest.<sup>452</sup> Once again, the Court found plaintiffs' intent inconsequential. Citing Congress's finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,"<sup>453</sup> with approbation, the Court explained that even material support meant to inspire peaceful conduct could be manipulated by FTOs.<sup>454</sup> "Such support," it continued, is "fungible," as it "frees up other resources within the organization that may be put to violent ends."<sup>455</sup>

The Court failed to cite any case law on this point or undertake its own evaluation of the facts. Rather, the Court based its

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449. *Id.* at 2725.

450. See, e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (stating that "[t]his phrase, coined by the late legal scholar Gerald Gunther in 1972, has been called 'one of the most famous epithets in American constitutional law' and has effectively defined the strict scrutiny standard in the minds of lawyers for two generations.").

451. *Holder*, 130 S. Ct. at 2724.

452. *Id.*

453. *Id.* (citing Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-21, § 301(a)(7), 110 Stat. 1214 (1996)).

454. *Id.* at 2725.

455. *Id.*

conclusions on “common sense,”<sup>456</sup> the findings made by Congress,<sup>457</sup> and statements of support from the State Department.<sup>458</sup> Ultimately, the majority emphasized the importance of not substituting its own evaluation of evidence for that of the executive and legislative branches, concluding, “evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference.”<sup>459</sup>

The dissent pointed to the lack of case law or congressional support for the proposition that all of the support the plaintiffs sought to provide was “fungible,”<sup>460</sup> and concluded that “the majority’s arguments stretch the concept of ‘fungibility’ beyond constitutional limits.”<sup>461</sup> Professor David Cole, counsel for the plaintiffs, raised a forceful point in congressional hearings and during oral argument that greatly enervates the majority’s “fungibility” or “freeing-up theory.” The definition of material support, codified at 18 U.S.C. § 2339A(b)(1) exempts “medicine and religious articles” from the definition.<sup>462</sup> Yet, donations of medicine and religious articles “are just as capable of freeing up resources as

456. *Id.* at 2726 n.6 (“Both common sense and the evidence submitted by the Government make clear that material support of a terrorist group’s lawful activities facilitates the group’s ability to attract ‘funds,’ ‘financing,’ and ‘goods’ that will further its terrorist acts.”).

457. *See supra* note 453 and accompanying text.

458. The majority references an affidavit by the acting coordinator for counterterrorism, Mr. Kenneth R. McKune, twelve times in its opinion. *See, e.g. Holder*, 130 S. Ct. at 2727 (“[t]he experience and analysis of U.S. Government agencies charged with combating terrorism strongly support Congress’s finding that all contributions to foreign terrorist organizations – even those for seemingly benign purposes – further those groups’ terrorist activities.”).

459. *Id.* *See also* Zerwas, *supra* note 376, at 5348 (“The Court ultimately based its finding that the law was narrowly tailored on a tautology: the law was passed because it was necessary and it could not have been necessary were it not narrowly tailored.”).

460. *Holder*, 130 S. Ct. at 2738 (Breyer, J., dissenting) (“Neither Congress nor the Government advanced these particular hypothetical claims. I am not aware of any case . . . in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, *e.g.*, buy negotiating time for an opponent . . .”).

461. *Id.* (Breyer, J., dissenting).

462. 18 U.S.C. § 2339A(b)(1). *See* Transcript of Oral Argument at 62, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498) (“This is a statute that doesn’t bar all aid, it doesn’t even bar all speech. It permits unlimited provision of religious materials, even if they advocate jihad, but proscribes any secular material, even if they are advocating peace.”).

the prohibited donations.”<sup>463</sup> Curiously, the dissent never addressed this point.

The Court treated the plaintiffs' final claim that section 2339B violated their freedom of association similarly to the speech claims. The Court viewed the statute as not prohibiting membership with an FTO but rather prohibiting “the act of giving material support” to the FTO.<sup>464</sup>

Under the Court's deferential holding in *Holder*, it is clear that the Court will not require a specific intent *mens rea* to find a violation of the statute. This is critical as it essentially assures a conviction on the charge of providing MST in the federal courts. *Holder* therefore makes it all the more inexplicable that the government continues to charge detainees with providing MST before military commissions, where the same conviction can only be secured by proving the charge is a traditional law of war violation. That is the focus of the final section.

### *C. A Crime by Any Other Name: MST as a Law of War Violation*

This section considers the CMCR's two recent holdings that MST is a violation of the law of war.<sup>465</sup> It begins by considering the subject matter jurisdiction of military commissions. As military commissions are Article I courts, their subject matter jurisdiction is limited, in this case by the Define and Punish Clause.<sup>466</sup> Moreover, because military commissions' only purpose is to “define and punish . . . Offenses against the Laws of Nations,” their jurisdiction

463. *Aiding Terrorists Hearing*, *supra* note 30, at 144 (statement of Professor David Cole).

464. *Holder*, 130 S. Ct. at 2730.

465. On June 24, 2011, the en banc United States Court of Military Commission Review held that Congress had authority under the Define and Punish Clause to declare MST a violation of the law of war and therefore, the military commission's assertion of jurisdiction over the charged offenses was proper. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1313 (2011). Less than three months after the *Hamdan* decision, the en banc CMCR decided *U.S. v. Ali Hamza Ahmd Suliman al Bahlul*, 2011 WL 4916373 (U.S.C.M.C.R., Sept. 9, 2011) (holding that evidence was sufficient to establish the military commission's subject-matter jurisdiction over the crimes of MST, conspiracy, and solicitation). As the *al Bahlul* court relied heavily on its decision in *Hamdan*, the section will focus on the *Hamdan* decision.

466. Congress specifically invoked the Clause in legislating the 2006 MCA. See H.R. REP. NO. 109-664, pt.1, at 24 (2006) (“The offenses defined here are not new crimes, but rather reflect the codification of the law of war into the United States Code pursuant to Congress's constitutional authority to ‘Define and Punish [] Offences against the Law of Nations.’”).

is limited to law of war violations. The dispositive question is therefore whether MST constitutes a violation of the law of war. The final section, which offers a critical analysis of the CMC's recent holding in *United States v. Hamdan*, concludes that MST does not constitute a law of war violation and therefore exceeds the limited jurisdiction of military commissions.

### 1. Courts of Limited Jurisdiction

Depending upon the source of their authority, federal courts fall into one of two broad categories. Article III of the Constitution vests "[t]he judicial power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."<sup>467</sup> Article III courts are courts of broad jurisdiction.<sup>468</sup> Additionally, under Article I of the Constitution, Congress has the power to "constitute Tribunals inferior to the supreme Court."<sup>469</sup> Military commissions are Article I courts and are therefore courts of limited jurisdiction.<sup>470</sup>

To prosecute an accused in a military commission, the court must have subject matter jurisdiction over the charges. Military commissions derive their authority pursuant to Congress's enumerated power to define and punish offenses against the law of nations.<sup>471</sup> Consequently, commissions' jurisdiction is limited to those offenses which are violations of the laws of war. Were a military commission to try a crime other than a law of war violation, it would overreach its special jurisdiction and its pronouncement would be void. This is an indisputable notion; recognized by the Judicial,<sup>472</sup> Legislative<sup>473</sup> and Executive branches.<sup>474</sup>

467. U.S. CONST. art. III, § 1.

468. See, e.g., James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 649 (2004) ("Article III permits Congress to create lower federal courts and to invest those courts with a broad range of original and appellate jurisdiction . . .").

469. U.S. CONST. art. I, § 8, cl. 9.

470. See, e.g., *Kempe's Lessee v. Kennedy et al.*, 9 U.S. 173, 179 (1809).

471. U.S. CONST. art. I, § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.").

472. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 603 (2006) ("At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war."). See also *Yamashita v. Styer*, 327 U.S. 1, 13 (1946) ("Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is

The law of war is the “customary and treaty law applicable to conduct of warfare on land and to relationships between belligerents and neutral states.”<sup>475</sup> Violations of the law of war are war crimes.<sup>476</sup> War crimes came to prominence as a result of World War II and efforts to hold members of the Nazi party responsible for violations of the international laws and customs governing wars.<sup>477</sup> Specifically, Article 6 of the Charter of the Nuremberg International Military Tribunal gave the Tribunal jurisdiction to try those who had committed war crimes.<sup>478</sup>

American jurisprudence has required a consistently established precedent in determining what constitutes a war crime. In 2004, for example, the Supreme Court held that “[a]ctionable violations of international law must be of a norm that is specific, universal, and

of a violation of the law of war.”); *Ex Parte Quirin*, 317 U.S. 1, 29 (1942) (“We are concerned only with the questions whether it is within the constitutional power of the National Government to place [appellant] on trial before a military commission for the offenses charged.”).

473. *See, e.g.*, 2006 MCA, *supra* note 19, § 948b(a) (“This chapter establishes procedures governing the use of military commission to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.”); 2009 MCA, *supra* note 19, at § 948(d) (“A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . or the law of war . . .”).

474. The President, through two of his representatives, has recognized commissions’ limited jurisdiction to try war crimes. *See, e.g.*, 2009 *Military Commissions Hearing before Armed Services*, *supra* note 65, at 9 (statement of the General Counsel for the Department of Defense, Jeh Johnson) (“Military commissions are obviously for violations of the law of war.”); *id.* at 7 (statement of Assistant Attorney General, National Security Division, Department of Justice, David S. Kris) (“Military commissions can help do the same for those who violate the law of war – not only detain them for longer than might otherwise be possible under the law of war, but also brand them as illegitimate war criminals.”).

475. DEP’T OF DEF., U.S. ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 3 (1956) [hereinafter FM 27-10]. The law of war is also referred to as international humanitarian law. *See, e.g.*, INT’L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW 1 (2007), [http://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf).

476. FM 27-10, *supra* note 475, at 188.

477. *See, e.g.*, MARKO DIVAC ÖBERG, INT’L COMM. OF THE RED CROSS, THE ABSORPTION OF GRAVE BREACHES INTO WAR CRIMES LAW 164-65 (2009).

478. INT’L COMM. OF THE RED CROSS, AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS, AND CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL. LONDON, art. 6 (Aug. 8, 1945), <http://www.icrc.org/ihl.nsf/WebART/350-530014?OpenDocument>.

obligatory.”<sup>479</sup> Two years later, grappling with whether conspiracy was a violation of the law of war, the *Hamdan* plurality held that such precedent must be by “universal agreement and practice.”<sup>480</sup> Additionally, the Court held that “[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.”<sup>481</sup>

Both Judge Allred (the military judge at Hamdan’s commission) and the *Hamdan* CMCR disregarded this precedent. Indeed, Judge Allred’s conclusion that the evidence establishing MST as a war crime is “mixed”<sup>482</sup> clearly runs counter to these holdings, as a “mixed” precedent cannot be by “universal agreement and practice.”<sup>483</sup> For its own part, the CMCR eschews the universality standard and instead relies upon an inapposite holding by a federal district court.<sup>484</sup>

Notwithstanding Judge Allred’s and the CMCR’s holdings, the government would certainly appear to have the weaker argument that MST constitutes a war crime. MST has never been charged by an international tribunal,<sup>485</sup> nor does it have any support in current international treaties or customary law.<sup>486</sup> The International

479. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

480. *Hamdan v. Rumsfeld*, 548 U.S. 557, 603 (2006).

481. *Id.*

482. *Hamdan*, Ruling on Motion to Dismiss, *supra* note 272, at 5.

483. See, e.g., James G. Vanzant, Note, *No Crime Without Law: War Crimes, Material Support for Terrorism, and the Ex Post Facto Principle*, 59 DEPAUL L. REV. 1053, 1067 (2010). While acknowledging this precedent, Judge Allred chose to defer to Congressional findings that MST constituted a war crime. See *Hamdan*, Ruling on Motion to Dismiss, *supra* note 272, at 5 (“But where Congress has acted under its Constitutional authority to define and punish offenses against the law of nations, a greater level of deference to that determination is appropriate.”).

484. *Hamdan*, 801 F. Supp. 2d at 1270 (quoting *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220-21 (S.D.N.Y. 2000)) (“Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to define offenses against the law of nations.”).

485. T. Jack Morse, Note, *War Criminal or Just Plain Felon? Whether Providing Material Support for Terrorism Violates the Laws of War and Is Thus Punishable by Military Commission*, 26 GA. ST. U. L. REV. 1061, 1070-73 (surveying the charged offenses at Nuremburg, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL)).

486. Brief for Salim Ahmed Hamdan at 28, Professor David Glazier as Amicus Curiae Supporting Petitioner, *Hamdan v. United States*, 801 F. Supp. 2d 1247 (2011)



Committee of the Red Cross,<sup>487</sup> a United Nations Human Rights Council Special Rapporteur,<sup>488</sup> and the United States Congressional Research Service<sup>489</sup> have all voiced varying degrees of skepticism that MST is a war crime.

MST is neither identified as a war crime in the U.S. Army JAG Corps' Law of War Deskbook,<sup>490</sup> nor in the War Crimes Act (WCA) of 1996, which postdates 18 U.S.C. § 2339A.<sup>491</sup> The WCA's omission is particularly revealing. As Professor David Glazier, an *amicus curiae* for the petitioner in *Hamdan v. U.S.*, observes, "since Congress was clearly familiar with the offense at the time of the War Crimes Act enactment, the fact that it is not included is logically significant."<sup>492</sup> Finally, the statute of the International Criminal Court, referred to as "the most comprehensive, definitive and authoritative list of war crimes . . ." <sup>493</sup> never mentions the crime of MST.<sup>494</sup>

While the CMCR concedes that MST does not appear in any international treaties or enumerated offenses, the court relies on a smattering of international and historic irrelevancies to conclude by analogy that the "underlying wrongful conduct of providing material support for terrorism . . . was a cognizable offense under

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(No. 11-1257) [hereinafter Glazier brief].

487. A comprehensive study undertaken by the ICRC in 2005 on customary international humanitarian law does not discuss MST or any analogous crime. See 1 INT'L. COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 625 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

488. See, e.g., Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 12, U.N. Doc.A/HRC/6/17/Add.3 (Nov. 22, 2007), <http://www.unhcr.org/refworld/type,MISSION,,USA,4757c5f52,0.html> (concluding that the crime of providing material support to terrorism goes "beyond the offences under the laws of war.") [hereinafter *Special Rapporteur Report*].

489. See, e.g., ELSEA, *supra* note 180, at 10 ("Similarly, defining as a war crime the 'material support for terrorism' does not appear to be supported by historical precedent.").

490. BOVARNICK ET AL., *supra* note 57.

491. See War Crimes Act of 2006, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441).

492. Glazier brief, *supra* note 486, at 28.

493. Robert Cryer, *International Criminal Law vs. State Sovereignty: Another Round*, 16 EUR. J. INT'L L. 979, 990 (2005) (quoting Mark Lattimer & Philippe Sands, *Human Rights, the Laws of War and International Crimes*, in JUSTICE FOR CRIMES AGAINST HUMANITY 5 (Mark Lattimer & Philippe Sands eds., 2003)).

494. See generally Rome Statute, July 17, 1998, 2187 U.N.T.S. 90.

the law of war.”<sup>495</sup> Not only is the court’s reasoning logically unsound, but offenses established through analogical reasoning have been declared by the Supreme Court to be “not compatible with our constitutional system.”<sup>496</sup>

There is a perfectly logical reason why MST has never been recognized as a war crime. As noted above, combating terrorism has largely been the responsibility of domestic law enforcement – at least until the advent of the war on terror.<sup>497</sup> While it is true the Bush Administration succeeded in paradigmatically shifting that responsibility from a fully capable law enforcement to a reluctant<sup>498</sup> military, that shift does not transform a domestic crime into a war crime. That is precisely what Congress did in incorporating MST in the 2006 and 2009 MCAs. Whether Congress exceeded its authority in doing so is the subject of the next section.

## 2. Does Saying So Make It So: The Define and Punish Clause

At the heart of the debate over military commissions’ jurisdiction lies a power “[r]arely cited by the Supreme Court, relied upon in only a handful of cases.”<sup>499</sup> As the only reference to international law in the Constitution, the Define and Punish Clause authorizes regulation by Congress of any subject governed by international law.<sup>500</sup>

The historical record indicates that congressional regulation under the clause is limited to clarifying existing norms of international law rather than creating wholly new ones.<sup>501</sup> For

495. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1313 (D.C. Cir. 2011).

496. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1972) (holding that punishment by analogy, though common in Soviet Russia, is incompatible with the American constitutional system).

497. See *supra* note 38 and accompanying text.

498. See, e.g., *Legal Issues Hearing*, *supra* note 13, at 36 (Statement of Rear Admiral John D. Hutson(Ret.), Former Judge Advocate General of the Navy) (expressing concerns that the U.S. military’s lead role in military commissions will compromise the military’s position as one of the most “highly respected institution[s] in the United States”).

499. Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to ‘Define and Punish . . . Offenses Against the Law of Nations*, 42 WM. & MARY L. REV. 447, 449 (2000). See also *United States v. Ali Hamza Ahmad Suliman al Bahlul*, 820 F. Supp. 2d 1141, 1170 (U.S.C.M.C.R. 2011) (“Judicial review of the scope of Congressional authority to define and punish offenses against the law of nations is infrequent.”).

500. Stephens, *supra* note 499, at 520.

501. See, e.g., *id.* at 474 (“The debates at the Constitutional Convention made

example, the English Parliament was similarly circumscribed in incorporating international legal norms into the domestic code.<sup>502</sup> Before the signing of the U.S. Constitution, Blackstone observed that Parliament could provide definitional certainty to offenses but did not have the power to alter their substance.<sup>503</sup> President Lincoln's Attorney General endorsed Blackstone's view at the conclusion of the Civil War. In an opinion as to whether those who conspired to assassinate President Lincoln could be tried by military commission Attorney General Speed concluded:

To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being . . . Congress has the power to *define*, not to make, the laws of nations . . . . Hence Congress may define those laws [and] may modify [those laws] on some points of indifference.<sup>504</sup>

The view that Congress's authority is circumscribed by existing norms is echoed in much of the contemporary scholarship.<sup>505</sup> Finally, in the handful of cases in which the Supreme Court has considered the Clause, "[t]hese cases indicate that the Clause today means exactly what the framers intended when they drafted the Constitution: that is, the Offenses Clause grants Congress the power

clear that Congress would have the power to punish only actual violations of the law of nations, not to create new offenses."). See also A.J. Colangel, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 141 (2007) ("[T]his is not to say that the founders intended to give Congress free reign to determine offenses against the law of nations. . . . It is clear from the drafting history of the Clause that only offenses established by the 'consent' of nations . . . would qualify.").

502. Brief for Constitutional Law Scholars as Amici Curiae Supporting Petitioner at 12, *Hamdan v. United States*, 801 F. Supp. 2d 1247 (2011) (No. 11-1257) [hereinafter Conlaw Scholars brief].

503. *Id.*

504. *Al Bahlul*, 820 F. Supp. 2d at 1170-71 (quoting James Speed, *Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President*, 11 Op. Atty. Gen. 297, 299 (1865)).

505. See, e.g., J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 849 (2007) ("The Law of Nations Clause is viewed by the majority of academic commentators as a rather limited power to either enact regulatory statutes governing the conduct of individual persons who violate international law, or to constitute tribunals to adjudicate the conduct of such individuals."). See also Samuel T. Morison, *History and Tradition in American Military Justice*, 33 U. PA. J. INT'L L. 121, 123 (2011) ("If the distinction between 'making' and 'defining' is substantially correct, it suggests that Congress has the flexibility to 'modify on some points of indifference' . . . but could not reasonably be construed as having a license to create new offenses out of whole cloth . . . .").

to impose sanctions on existing violations of international law, but not to create new norms.”<sup>506</sup> The CMCR, however, jettisoned these views in the name of deference. The *al Bahlul* court held:

On the other hand, there is substantial authority supporting the Government’s position that “greatest deference” is due Congress’ determination that the offenses of which appellant stands convicted constitute offenses under the law of nations; particularly where that determination directly implicates both national security interests in an ongoing armed conflict and foreign affairs, including interpretation of treaty obligations and customary international law.<sup>507</sup>

The CMCR’s immoderate willingness to defer to Congress, despite the evidence that the body had exceeded its authority under the Define and Punish Clause, is an illustration of the court’s apathy toward safeguarding its emphatic role in declaring “what the law is.”<sup>508</sup> As the final sections considers, it would not be the court’s last.

### 3. A Deferential CMCR Creates a New War Crime

The CMCR’s *Hamdan* decision rests on a survey of distinct sources of international law and dubious American precedent. Before turning to the substantive issues, the court signals the deference it will accord the government. Early in the opinion the court explains:

With the enactment of the 2009 M.C.A., two different Presidents and two different Congresses have spoken on the issue of how military commissions should be conducted. After vigorous Congressional debate, the 2009 M.C.A. did not change the jurisdiction of military commissions nor did it eliminate the offense of providing material support for terrorism.<sup>509</sup>

This deference is, however, misplaced given the well-known views of the current Administration with respect to MST. In a 2009 Congressional hearing considering revisions to the 2006 MCA, two representatives of the executive branch urged Congress not to

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506. Conlaw Scholars brief, *supra* note 502, at 21.

507. *Al Bahlul*, 2011 820 F. Supp. 2d at 1170-71.

508. *Boumediene v. Bush*, 553 U.S. 723, 727 (2008) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

509. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1262 (2011).

include the charge of MST in the forthcoming 2009 MCA.<sup>510</sup> The court, however, makes no apologies for its selective deference. In a statement detached from recent Supreme Court national security jurisprudence,<sup>511</sup> as well as Chief Justice Marshall's maxim in *Marbury v. Madison*,<sup>512</sup> the Court curiously pronounced that "the Supreme Court has consistently refrained from interfering in congressional decisions made pursuant to the national security clauses."<sup>513</sup>

The CMCR then turns to the issue at hand. The court's opinion commits two fatal errors. First, as will be considered in greater detail below, it conflates the crime of MST with the broader crime of terrorism. Second, it confounds mere criminal acts with war crimes. As the court explains, "[w]e have an independent responsibility to determine whether appellant's charged conduct existed as well-recognized *criminal* conduct."<sup>514</sup> That is *not* the court's responsibility. Rather, the proper question before the court was to determine whether MST has substantive, historical precedence as a *war crime* and therefore, whether Congress exceeded its authority by including it in the 2006 and 2009 MCAs. As the court demonstrates, the fact that the community of nations views terrorism (rather than MST) as a domestic crime merely supports the view that Salim Ahmed Hamdan should be tried in the federal courts, not a military commission with the exclusive authority to adjudicate violations of the laws of war. In a telling subheading entitled "Criminalization of Analogous Global Conduct,"<sup>515</sup> the court considers the following three distinct sources of international law.

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510. 2009 *Military Commissions Hearing before Armed Services*, *supra* note 65, at App. G at 46 (prepared statement of the General Counsel for the Department of Defense, Jeh Johnson) ("After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism" . . . is not a traditional violation of the law of war. We believe it would be best for material support to be removed from the list of offenses triable by military commission . . ."); *id.* at App. H at 52 (statement of Assistant Attorney General, National Security Division, Department of Justice, David S. Kris) (noting "there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war.").

511. *Holder v. Humanitarian* notwithstanding, see *supra* note 430.

512. 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

513. *Hamdan*, 801 F. Supp. 2d at 1266.

514. *Id.* at 1279 (emphasis added).

515. *Id.*

*a. International Conventions and Declarations*

With a brief analysis of the four Geneva Conventions and a smattering of international terrorism conventions, the CMCR concludes that “international conventions and treaties provided an additional basis in international law that appellant’s charged conduct in support of terrorism was internationally condemned and criminal.”<sup>516</sup> The court’s argument appears to be that because acts of terrorism are internationally condemned, MST is a law of war violation. In effectuating this leap the court commits three inter-related errors.

First, the court compounds the distinct crimes of terrorism and MST.<sup>517</sup> While the laws of war criminalize certain terrorist acts, such as spreading terror among civilian populations,<sup>518</sup> such acts, unlike MST, require a specific *mens rea* and knowledge by the perpetrator.<sup>519</sup> As an amicus brief for Hamdan explains, “[c]reation of a war crime without requiring specific intent and knowledge of the particular attack and its consequences for civilians would represent a dramatic and unprecedented change in the Law of Armed Conflict.”<sup>520</sup>

Second, and assuming *arguendo* that crimes of terrorism and

516. *Id.* at 1284.

517. Both the 2006 and 2009 MCAs define terrorism as:

The intentional[] kill[ing] or inflict[ing] great bodily harm on one or more protected persons, or intentionally engag[ing] in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct.

2006 MCA, *supra* note 19, § 950(v)(b)(24); 2009 MCA, *supra* note 19, § 950(t)(24).

518. *See, e.g.*, Civilian Convention, *supra* note 69, art. 33 (holding that “all measures of intimidation or of terrorism are prohibited”); APII, *supra* note 155, art. 4(2)(d) (prohibiting “acts of terrorism” against all persons who do not take a direct part or who have ceased to take part in hostilities); *id.* art. 13(2) (prohibiting “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”).

519. *See, e.g.*, Prosecutor v. Fofana & Knodewa, Case No. SCSL-04-14-A, Special Court for Sierra Leone, Appeals Chamber Judgment, ¶ 322 (May 28, 2008) (acquitting defendants of terrorism as they lacked the specific intent to spread terror); Prosecutor v. Galić, Case No. It-98-29-A, Appeals Chamber Judgment, ¶ 108 (Nov. 20, 2006) (reversing the Trial Chamber’s holding as “no reasonable trier of fact could have reached the Trial Chamber’s conclusion that [Galić] had the intent to spread terror”).

520. *See, e.g.*, Brief for Salim Ahmed Hamdan at 4, International Legal Scholars as Amicus Curiae Supporting Petitioner, Hamdan v. United States, 801 F. Supp. 2d 1247 (2011) (No. 11-1257) [hereinafter ILS brief].

MST are analogous, neither a single convention nor declaration the court cites stands for the proposition that terrorism is a *war crime*. Quite the contrary, the sources cited by the court merely illustrate that terrorism is a crime of international concern to be tried by member states' domestic law enforcement.<sup>521</sup>

Third, few of the conventions and declarations the court cites are analogous in any manner to the crime of MST. Of those that are, they once again call for punishment under domestic criminal codes rather than military commissions or international tribunals.<sup>522</sup> Absent from the court's survey is any source standing for the proposition that MST is a war crime. The absence of a General Assembly resolution on this point is telling as such resolutions "serve as valuable hortatory evidence of emerging legal principles."<sup>523</sup>

*b. International Criminal Tribunals*

The CMCR fares no better in its analysis of international criminal tribunals. The court relies on the International Criminal Tribunal for the Former Yugoslavia (ICTY) for the proposition that joint criminal enterprise (JCE) is analogous to MST. In a harbinger of what is to come, the court begins its analysis by incorrectly identifying Slobodan Milošević as "Prime Minister."<sup>524</sup>

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521. *U.S. v. Hamdan*, 801 F. Supp. 2d 1247, 1282-83 (2011) ("Describing terrorism as a crime of international significance, the treaties oblige the parties to criminalize various facets of terrorism in their domestic criminal codes and to cooperate amongst themselves to prevent and punish acts of terrorism.").

522. *See, e.g.*, Declaration on Measures to Eliminate International Terrorism of 1994, G.A. Res. 49/60, §5(b), U.N. Doc. A/RES/49/60 (Dec. 9, 1994) ("To ensure the apprehension and prosecution of extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law."). *See also* International Convention for the Suppression of the Financing of Terrorism, G. A. Res. 54/109, ¶ 19, 2178 U.N.T.S. 197, 39 I.L.M. 270 (Dec. 9, 1999) ("The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations . . .").

523. Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 876-77 (1983).

524. *Hamdan*, 801 F. Supp. 2d at 1285. *See* Prosecutor v. Milošević, Second Amended Indictment, Case IT-02-54-T (July 28, 2004) (explaining that after serving two terms as President of the Republic of Serbia, Milošević was elected President of the Federal Republic of Yugoslavia and served in that position until October 6, 2000).

During Hamdan's military commission, the military judge struck all allegations relating to joint criminal enterprise and held that "the Government may not proceed to trial on its 'enterprise' theory of liability."<sup>525</sup> Undeterred by Judge Allred's ruling, the CMCRC concludes that "the doctrine brings a similar analytical nexus to providing material support for terrorism."<sup>526</sup>

JCE is a theory of individual liability that allows a crime to be attributed to a distinct individual so long as that individual was part of a group intending to perpetrate the crime.<sup>527</sup> The doctrine requires a synthesis of membership, organizational liability, and participation by the defendant.<sup>528</sup> As acknowledged by the CMCRC, JCE is not a stand-alone substantive offense.<sup>529</sup>

The court focuses its attention on the appeal chamber decision in *Prosecutor v. Tadić*. Duško Tadić was a Bosnian Serb and former member of a paramilitary force responsible for an attack on a predominantly Muslim community in the Prijedor region of Bosnia, described by a Balkan observer as one of the "most abhorrent cases of 'ethnic cleansing'" during the Bosnian War.<sup>530</sup> Although the Trial Chamber held that Tadić had played no role in the killing of five Bosnian men from the village of Jaskici, the Appeals Chamber overturned this decision and convicted Tadić on the basis of JCE.<sup>531</sup> Because Tadić had taken part in "the common criminal purpose to rid the Prijedor region of the non-Serb population" and he had the intent to "further the criminal purpose," he could be held responsible for the deaths as they were "foreseeable."<sup>532</sup>

The ICTY has identified three instances in which JCE could give rise to criminal liability. First, the "basic" form of JCE occurs when

525. Appellant's Supplemental Brief on Joint Criminal Enterprise and Aiding the Enemy at 2, *United States v. Salim Ahmed Hamdan*, C.M.C.R. Case No. 09-002 (Feb. 13, 2011) [hereinafter Appellant's Supplemental Brief].

526. *Hamdan*, 801 F. Supp. 2d at 1286.

527. See, e.g., Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 98 (2005).

528. *Hamdan*, 801 F. Supp. 2d at 1285.

529. *Id.*

530. MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBURG* 29 (1997).

531. See *Prosecutor v. Tadić*, Judgment by the Appeals Chamber, Case IT-94-1-A (July 15, 1999), at ¶ 22 [hereinafter *Tadić*, Judgment].

532. *Id.* ¶¶ 231-32.



all co-perpetrators act pursuant to a common plan.<sup>533</sup> Second, a “systematic” form of JCE exists when the common plan is characterized by systematic ill-treatment and typically occurs in a detention or concentration camp.<sup>534</sup> Finally, an “extended” form of JCE exists. With this type of liability, an individual such as Tadić shares a common plan with his co-perpetrators, cleansing, for example, the Prijedor region. Even were one of the co-perpetrators to act outside that common plan, by, for example, murdering five Bosnia men, Tadić could be held liable because such a crime were foreseeable.<sup>535</sup>

While all three categories share the same *actus reus*, the *mens rea* differs slightly. The basic form of JCE liability requires a specific intent.<sup>536</sup> The systematic form of JCE requires knowledge of the system of ill-treatment as well as intent to further that system.<sup>537</sup> The extended form requires intent to participate in and further the common criminal plan as well as an intentional contribution made toward realizing the common plan.”<sup>538</sup> The contribution to the common plan “need not be substantive . . . [but] should at least be a significant contribution to the crimes for which the accused is found responsible.”<sup>539</sup> That is to say, the contribution must be material. Unlike the charge of MST, an immaterial contribution would not be sufficient.<sup>540</sup>

In addition to this intent requirement, JCE can be readily distinguished from MST in three other respects. First, under all three types of JCE liability, three elements are required: (1) a plurality of persons; (2) engaging in a common plan involving the commission of a crime; (3) and the participation of the accused in the common plan.<sup>541</sup> None of these elements are required under MST. Indeed, Salim Hamdan’s MST charge contained no references

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533. Prosecutor v. Vasiljevic, Judgment by the Appeals Chamber, Case IT-98-32-A (Feb. 25, 2004), at ¶ 97.

534. *Id.* ¶ 98.

535. *Id.* ¶ 99.

536. *Id.* ¶ 101.

537. *Id.*

538. *Id.*

539. United States v. Hamdan, 801 F. Supp. 2d 1247, 1287 (2011).

540. *See Id.*

541. Vasiljevic, IT-898-32-A, at 100.

to either an “enterprise,” or a “common plan.”<sup>542</sup> Second, under JCE, material means material. That is, the contribution toward the end-state must be significant. Finally, and most significantly, JCE is not a substantive offense but a form of imputed liability. To draw a nexus between Hamdan’s behavior and JCE is to mix apples and oranges.

*c. Non-United States Domestic Terrorism Laws*

In its final section considering sources of international law the CMCR reviews anti-terrorism laws from Canada, India, and Pakistan.<sup>543</sup> The CMCR’s *al Bahlul* decision three months later considers no fewer than eleven nations’ domestic efforts at fighting terrorism.<sup>544</sup> The CMCR obviously found this section persuasive given its expansive survey in *al Bahlul*, yet it is entirely irrelevant as it only serves to again underscore the supposition that terrorism is a *domestic crime*. This survey, not to mention the absence of anything approximating MST, renders this section moot.

*d. Historical Precedent for Wrongfully Providing Aid to the Enemy*

In the court’s final section upholding Hamdan’s conviction of MST the court analogizes MST to the crime of aiding the enemy. In what is arguably the weakest part of the decision, the court surveys a number of historical precedents in drawing this analogy. The court’s analysis can withstand only the gentlest of examinations, and suffers from two fundamental flaws.

First, the precedents considered by the court are entirely American. Indeed, one writer has commented that the *Hamdan* decision “represents the apotheosis of the United States’ utterly self-referential approach to international law.”<sup>545</sup> As the practices of a single state cannot establish a norm for the law of nations,<sup>546</sup> the court’s failure to consider the practices of a sampling of states

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542. Appellant’s Supplemental Brief, *supra* note 525, at 16.

543. *Hamdan*, 801 F.Supp. 2d at 1289-92.

544. *United States v. Ali Hamza Ahmad Suliman al Bahlul*, 820 F. Supp. 2d 1141, 1198-1201 (U.S.C.M.C.R. 2011) (surveying domestic anti-terrorism legislation from Brazil, Egypt, France, India, Indonesia, Italy, Japan, Pakistan, Russia, Spain, and Sweden).

545. Heller, *Opinio Juris* Blog, *supra* note 18.

546. *See, e.g. Paquete Habana*, 175 U.S. 677, 694 (1900) (holding that a “comity, courtesy or concession [must] grow, by the general assent of civilized nations . . .”).

greatly undermines its analysis.

Second, the precedent with which the court begins – the First Seminole War – and the execution of two British citizens for allegedly assisting the Seminoles<sup>547</sup> is “one of the most notorious episodes in the annals of American history.”<sup>548</sup> Indeed, on March 24, 2011, the General Counsel to the Seminole Tribe of Florida wrote to Secretary of Defense Gates requesting that the government withdraw the “highly offensive and historically inaccurate” *al Bahlul* brief to the CMCR.<sup>549</sup> On April 7, 2011, Department of Defense General Counsel, Jeh Johnson, issued a formal apology to members of the Seminole tribe.<sup>550</sup> Likely aware of the incident, the CMCR wrote in its decision that it “takes no comfort in the historical context in which these events occurred” and cites them only “as an embryonic effort of the United States to deal with the complexity of fighters in irregular warfare.”<sup>551</sup>

Although the charge of aiding the enemy “is almost as old as warfare itself,”<sup>552</sup> and although Hamdan was never charged with

547. In 1818, then Major General Andrew Jackson led an invasion into Spanish Florida at the incitement of slave-holders whose slaves had fled to Florida. In addition to resisting Jackson’s forces, both the runaway slaves and the Seminole Indians residing in Florida had supported the British during the War of 1812. During hostilities, Jackson’s forces captured two British citizens, Alexander Arbuthnot and Robert Ambrister, believed to have been aiding the Seminoles. The two men were tried by military commission, found guilty of aiding, abetting, and comforting the enemy by supplying them with the means of war, and executed. See Morison, *supra* note 505, at 140-45; David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 27 (2005). See generally JOHN MISSALL & MARY LOU MISSALL, *THE SEMINOLE WARS: AMERICA’S LONGEST INDIAN CONFLICT* (2004).

548. Morison, *supra* note 505, at 123. See also Motion for Leave to File a Reply Brief at 26-27, U.S. v. Ali Hamza Ahmad Suliman Al Bahlul, C.M.C.R. Case No. 09-001 (Mar. 15, 2011) (quoting JOSHUA R. GIDDONS, *THE EXILES OF FLORIDA* 37 (1858) (“Perhaps no portion of our national history exhibits such disregard of international law, as this unprovoked invasion of Florida.”); WINTHROP, *supra* note 64, at 465 (“Thus, Arbuthnot’s execution was “wholly arbitrary and illegal. For such an order and its execution a military commander would *now* be indictable for murder.”)).

549. Letter from Jim Shore, Gen. Counsel, Seminole Tribe of Florida, to Hon. Robert M. Gates, Secretary of Defense (Mar. 24, 2011), *available at* [http://media.miamiherald.com/smedia/2011/03/25/17/Seminole\\_Ltr.\\_to\\_\\_Hon.\\_Robert\\_Gates\\_1\\_.source.prod.affiliate.56.pdf](http://media.miamiherald.com/smedia/2011/03/25/17/Seminole_Ltr._to__Hon._Robert_Gates_1_.source.prod.affiliate.56.pdf).

550. Carol Rosenberg, *Pentagon Lawyer Regrets Seminole-al Qaeda Analogy*, MIAMI HERALD, Apr. 8, 2011, <http://www.miamiherald.com/2011/04/08/2158076/pentagon-lawyer-apologizes-for.html>.

551. United States v. Hamdan, 801 F. Supp. 2d 1247, 1295 (2011).

552. *Id.* at 1292.

the offense, questions of interpretation garnered considerable attention from the CMCR. On February 3, 2011, the court requested a supplemental brief from counsel on whether “the offense of aiding the enemy [is] limited to those who have betrayed an allegiance or duty to a sovereign nation.”<sup>553</sup>

According to the government’s brief, while it is true that Hamdan was not charged with aiding the enemy, the material support he provided to al Qaeda could be characterized as conduct equivalent to the offense of aiding the enemy. If, however, a duty of allegiance is required to complete the offense, Hamdan, a Yemeni citizen with no ties to the United States, clearly would not be guilty and the analogy would fail. The government therefore cites approvingly to the executions of Arbuthnot and Ambrister, British subjects residing in Spanish Florida during the First Seminole War, for the proposition that their conduct was tantamount to aiding the enemy under the Articles of War. The fact that they were British, the government argues in its brief, is “indicative of the fact that Aiding the Enemy was not understood to contain a ‘silent element’ or breach of duty or allegiance.”<sup>554</sup> Additionally, as the government correctly notes, neither Article 81 of the Articles of War nor Article 104 of the UCMJ includes a duty of allegiance as an express element.<sup>555</sup>

According to Appellant’s brief, absent a duty of allegiance, which Hamdan did not possess, there can be no crime of aiding the enemy.<sup>556</sup> Logic compels such an interpretation. The construct supported by the government would have no limitations. In such a case, all enemy combatants – privileged and unprivileged alike – would be guilty of war crimes, merely by taking up arms against the United States, regardless of whether they scrupulously complied with the law of war.<sup>557</sup> History further compels this reading. No less an authority than Winthrop has explained that aiding the enemy was “treasonable.”<sup>558</sup> As such, the essence of the offense is

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553. Issues for Briefing and Order for Oral Argument, *United States v. Salim Ahmed Hamdan*, C.M.C.R. Case No. 09-002 (Feb. 3, 2011).

554. *Id.* at 16.

555. *Id.* at 15-16. See also War Dep’t, *The Articles of War Approved*, June 4, 1920, at art. 81; 10 U.S.C. § 904, MCM (2008), Part IV, 28.b.

556. Appellant’s Supplemental Brief, *supra* note 525, at 21.

557. See, e.g., Morison, *supra* note 505, at 132; Appellant’s Supplemental Brief, *supra* note 525, at 17.

558. Winthrop, *supra* note 64, at 629. See also Morison, *supra* note 505, at 135 n.40

not the support given, but “the breach of fidelity it entails.”<sup>559</sup> Furthermore, the 2010 Manual for Military Commissions requires “a breach of an allegiance or duty to the United States”<sup>560</sup> as the first element for the offense. Released on April 27, 2010 – well in advance of the CMCR’s *Hamdan* decision, the court curiously never refers to the Manual.

In what has now become its *modus operandi*, the court punts the difficult question of whether aiding the enemy lends support to the charge of MST as a war crime if *Hamdan* had no duty of allegiance to the United States. Rather, after asking for supplemental briefs and entertaining oral arguments on that very question, the court dismisses the very issue it initiated. The court writes, “It is unnecessary for this Court to determine whether aiding the enemy under Article 104, UCMJ, applies in this case because appellant is not charged with violating Article 104, UCMJ. We look to the law of war for the historical underpinnings of providing material support for terrorism.”<sup>561</sup> That is precisely what the court of military commission review failed to do.

#### IV. Conclusions

Times of national emergency test a nation’s values. Following the Japanese attack on Pearl Harbor and fearing another attack, the Roosevelt Administration interned over 120,000 people of Japanese descent living in the United States.<sup>562</sup> It took the United States forty-six years to close that ignominious chapter in American history and issue a formal apology and compensation.<sup>563</sup> The war on terror similarly compromised the nation’s values, particularly in the quest for justice for the enemy and the decision to try suspected terrorists by military commissions.

Nevertheless, after two overhauls of the entire system, Americans can be proud of the current military commissions

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(quoting Captain Jabez W. Loane, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 80 (1965) (referring to aiding the enemy as “the military law of treason.”).

559. Morison, *supra* note 505, at 132.

560. 2010 MANUAL FOR COMMISSIONS, *supra* note 172, at IV-20, ¶ 26(a).

561. *United States v. Hamdan*, 801 F. Supp. 2d 1247 n.130 (2011).

562. See, e.g., TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II 217 (2004).

563. See, e.g., Katherine Bishop, *Day of Apology and ‘Sigh of Relief,’* N.Y. TIMES, Aug. 11, 1988, at A1.

system. In addition to the federal courts, military commissions are at long last a viable instrument in bringing to justice those who would harm America while staying true to the values and ideals of the world's most vibrant democracy. Total redemption, however, remains deferred.

Military commissions continue to charge suspected terrorists with the offense of providing material support to terrorism. This article has argued that to truly understand that offense, one must view it in the larger context of the nation's initial response to the attacks of 9/11. The Authorization for Use of Military Force, passed just days after the 9/11 attacks, provided the theoretical underpinnings for what would become the Bush Doctrine, a sweeping credo that those who support terrorism, in any capacity, are as guilty as those carrying out the attacks. President Bush's November 13, 2001, Order authorizing military commissions provided the venue for which the charge of material support could bring the Bush Doctrine into final fruition.

Notwithstanding a pair of highly deferential decisions recently handed down by the Court of Military Commission Review, the charge of material support for terrorism cannot be said to constitute a violation of the laws of war. Consequently, military commissions have no jurisdiction over that charge. And yet, Congressional restrictions in the 2011 and 2012 National Defense Authorization Acts make military commissions the only vehicle for trying many suspected terrorists. Assuming commissions continue to charge MST, their credibility will therefore remain compromised.

Regardless of the nation's mistakes since 9/11, the truest strength of this country lies not in its military power but in its commitment to enduring values of humanity and justice. As the President affirmed in his Nobel lecture, "We lose ourselves when we compromise the very ideals that we fight to defend. And we honor ideals by upholding them not when it's easy, but when it is hard."<sup>564</sup> The history of military commissions over the past decade is testament that the nation constantly seeks to better our system and our world and correct our mistakes. One final error must be corrected before complete redemption is achieved.

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564. See Press Release, The White House, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

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